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ASSOCIATE JUSTICE - SUPERIOR COURT
COMMONWEALTH OF MASSACHUSETTS
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CASES ARGUED AND DETERMINED

MASSACHUSETTS

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

FEBRUARY 1916—MAY 1916

HENRY WALTON SWIFT

REPORTER

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BOSTON

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. CHARLES AMBROSE DE COURCY.

HON. JOHN CRAWFORD CROSBY.

HON. EDWARD PETER PIERCE.

HON. JAMES BERNARD CARROLL.

ATTORNEY GENERAL

HON. HENRY CONVERSE ATTWILL.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES
ARGUED AND DETERMINED,
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HENRY J. GREEN *vs.* TIMOTHY J. DANAHY.

Essex. November 3, 1915.—February 11, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY & CROSBY, JJ.

Cemetery. Burial. License, Revocable on failure to perform condition. *Contract*,
In writing. *Evidence*, Extrinsic affecting writings.

Oral evidence is admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the cemetery and that the right was granted subject to the condition that the certificate holder should grade and care for the lot and that, if he failed to do so, the right of burial might be revoked and remains interred in the lot might be removed.

The purchaser of a right of burial in a lot in a Roman Catholic cemetery paid \$50 and received a certificate which stated that the right was granted subject to certain regulations "or such others as may be from time to time prescribed in relation to burials in the said cemetery." When the purchaser was choosing his lot the pastor in charge of the cemetery told him that he must assume the duty of grading and caring for the lot that he purchased, that, if he failed to perform that duty, the pastor would have recourse to drastic measures which might go so far as to cause the removal of the remains that had been interred in the lot, and that the price of the lot was made very low because of this burden that was imposed upon the purchaser. The purchaser made no objection to these conditions. He paid for his certificate, but neither graded nor cared for the lot and permitted it to remain in a rough unimproved condition and allowed grass, weeds and brush to grow wild upon it. When this neglect had continued for ten years the pastor without the knowledge or consent of the purchaser removed the remains of the purchaser's mother from the lot and buried

them elsewhere in the cemetery. In a suit in equity by the purchaser against the pastor to obtain redress, the trial judge found the facts stated above and found that the certificate held by the plaintiff did not and was not intended to contain all the terms of the contract but was a mere memorandum and that the oral conditions as to care and grading formed a part of the consideration of the contract and were binding upon the plaintiff. He made a decree that the bill be dismissed, and, on appeal to this court, it was *held*, that the conversation between the parties when the plaintiff agreed to grade and care for the lot was admitted in evidence rightly, and, the finding of the judge not appearing on the entire evidence, which was reported, to be clearly wrong, the decree dismissing the bill was affirmed.

BILL IN EQUITY, filed in the Superior Court on September 19, 1912, by the holder of a certificate for a burial lot in Saint Mary's Catholic Cemetery in Needham against the pastor in charge of that cemetery, alleging that the body of the plaintiff's mother without the plaintiff's knowledge or consent had been exhumed from the cemetery lot and buried elsewhere by and under the direction of the defendant, and praying, among other things, that the defendant be ordered to allow the plaintiff to remove the body of his mother from its present place and, if the plaintiff so desired, to rebury it in the lot represented by the plaintiff's certificate, that the defendant be ordered to pay to the plaintiff the reasonable expense of such removal and reburial, that the defendant be enjoined from interfering in the future with the remains interred by the plaintiff in the lot, for damages and costs and for further relief.

The certificate, of which a copy was annexed to the bill, was dated November 26, 1902, and was signed by the defendant as pastor. The certificate contained, among other matters, the following:

"This certifies, that for and in consideration of fifty dollars, paid by Henry G. Green of Lynn, Mass. the right is granted to him and the Roman Catholic members of his family to bury in Lot No. 223, Sec. A. in St. Mary's Catholic Cemetery, Needham, Mass., subject always to the following regulations, or such others as may be from time to time prescribed in relation to burials in the said Cemetery, viz: —"

"2. It is to be expressly understood that this Certificate is not a conveyance of real estate, nor does it confer any right to sell or transfer the Lot herein mentioned."

"7. No fence, wall or other enclosure shall be made around any

lot or grave; no cross shall be built or set up without special permission from the Pastor; nor shall any monument or headstone be erected, or trees or shrubbery planted, unless such as are approved of by the Pastor; nor shall any alteration or improvement be made in any lot or grave unless in accordance with the plan of the Cemetery."

The defendant's answer contained, among other matters, the following:

"6. Further answering, the defendant says that at the time when he gave the plaintiff the certificate referred to in the bill, the defendant was engaged in clearing, grading and beautifying the said cemetery as a whole and fitting the same for use as a cemetery. The lot described in plaintiff's certificate is in the best and most conspicuous part of the cemetery, and the plaintiff promised and agreed with the defendant as a part of the consideration to grade, clear and improve said lot and the certificate was received and held by the plaintiff upon the express condition that plaintiff would forthwith carry out his said agreement. The plaintiff took and held said certificate subject to such regulations as had then or might thereafter be made and prescribed in relation to burials in the said cemetery. One of said regulations was that lot owners must care for their lots and keep them in a condition of reasonable conformity to the other improved parts of said cemetery. Another of said regulations was as follows:

"Should a lot be not paid for at the specified time, in case such a time extension is made, or within a year at the limit, the right is reserved to the pastor to transfer such body or bodies therein interred to the grave section of the cemetery and thereby release said lot for a new purchaser. The plaintiff never in any part performed his said promise to grade, clear and improve said lot, but left the same in the rough state in which it was and overgrown with unsightly bushes and weeds. The plaintiff wholly failed to conform to said regulations although notified by the defendant to do so, and that said rules would be enforced, on two occasions, except that plaintiff paid fifty dollars as the cash part of the consideration. After the plaintiff's default hereinbefore set forth had continued for many years, the defendant, being unable to find the plaintiff or learn where he was, enforced the said regulations by the only means in his power; namely by removing the said

body in a proper and careful manner to the grave section of said cemetery which is at all times properly cared for by the defendant. And the defendant has at all times been and now is ready and willing to account to the plaintiff for all of said fifty dollars over and above the value of said single grave."

The case was heard by *Hamilton, J.*, who made a memorandum of findings, including those that are stated in the opinion, and ordered that the bill be dismissed. From the decree entered in accordance with this order the plaintiff appealed. The entire evidence was reported by a commissioner appointed under Equity Rule 35.

H. R. Mayo, for the plaintiff.

D. L. Smith, for the defendant.

CROSBY, J. The certificate which was delivered to the plaintiff by the defendant states that the right "is granted to him and the Roman Catholic members of his family to bury in Lot No. 223, Sec. A. in St. Mary's Catholic Cemetery, Needham, Mass., subject always to the following regulations, or such others as may be from time to time prescribed in relation to burials in the said Cemetery." Then follow several provisions, some of which relate to occupancy of the lot and others concern the manner in which interments shall be made therein. Paragraph 2 of the certificate also states that "It is to be expressly understood that this Certificate is not a conveyance of real estate, not does it confer any right to sell or transfer the Lot herein mentioned."

The right which the plaintiff received under this certificate was merely a right of burial. It was merely a license or privilege of burial, and the terms upon which it could be exercised were subject to such reasonable rules and regulations as the defendant should from time to time impose. *McCrea v. Marsh*, 12 Gray, 211. *Burton v. Scherpf*, 1 Allen, 133. *Sohier v. Trinity Church*, 109 Mass. 1. *Dwenger v. Geary*, 113 Ind. 106. *McGuire v. St. Patrick's Cathedral*, 54 Hun, 207. 6 Cyc. 711, 717, 718, 719.

The provision in the certificate that it is granted subject to the regulations therein contained and "such others as may be from time to time prescribed in relation to burials in the said Cemetery" authorized the imposition of regulations in addition to those expressly stated in the certificate, and such regulations properly might be in writing or orally communicated when the certificate was issued, and the consideration was paid therefor. The rule

that parol evidence is not admissible to alter, vary or control a contract in writing is not applicable to such an instrument, the express language of which authorized alterations and variations from time to time. See *North Packing & Provision Co. v. Lynch*, 196 Mass. 204.

The judge of the Superior Court, before whom the case was heard, found that just before the agreement for the issuance of the certificate to the plaintiff had been completed, and while the parties were in the cemetery and the plaintiff was making a choice of lots, the defendant stated to the plaintiff in substance, "that the plaintiff must assume the duty of grading and caring for the lot that he purchased and if he failed to perform that duty the defendant would have recourse to drastic measures which might go so far as to cause the removal of the remains that had been interred in it; that the price of the lot was made very low because of this burden that was imposed upon the purchaser."

The judge further found "that the plaintiff did not object to these conditions and impliedly assented to them . . .; that the said certificate did not and was not intended to contain all the terms of the contract but was a mere memorandum and that the oral conditions as to care and grading formed a part of the consideration of the contract and were binding upon the plaintiff."

The judge also found "that the plaintiff neither graded nor cared for the lot in question at any time, but permitted it to remain in a rough, unimproved condition and allowed grass, weeds, and brush to grow wild upon it, so that its appearance became unsightly, unkempt and neglected and not in conformity with the other adjoining parts of the cemetery."

The certificate was issued to the plaintiff in November, 1902, soon after which the body of the plaintiff's mother was buried in the lot. The judge found that about two years later the defendant sent by mail a letter directed to the plaintiff, in which he (the defendant) requested the plaintiff "to clear the lot and care for it or the defendant might be compelled to remove the remains of the plaintiff's mother . . . and that about two years thereafter [the defendant] sent him [the plaintiff] another letter by mail of like tenor, but the defendant did not receive a reply to either." The judge found that the plaintiff did not receive either of these letters.

In 1912 the defendant caused the remains of the plaintiff's mother to be removed from the lot and to be buried in another part of the cemetery, but without the knowledge or consent of the plaintiff. It is for the removal of the remains of his mother from the lot that the plaintiff seeks redress in this suit.

The case at bar is clearly distinguishable from *Meagher v. Driscoll*, 99 Mass. 281. In that case the written instrument under which the plaintiff claimed a right of burial conferred a right to the exclusive occupation of a particular lot with *habendum* to the plaintiff and his heirs and assigns.

The evidence of the conversation between the parties when the certificate was issued, wherein the plaintiff agreed to grade and care for the lot, was properly admitted.

The entire evidence having been reported, we do not perceive any error in the admission or exclusion of evidence, nor are we able to say that the findings of the trial judge or his order dismissing the bill were clearly wrong. Therefore the entry must be

Decree affirmed.

SAMUEL B. DONOVAN & another vs. JOSEPH A. DONOVAN & another.

Suffolk. October 19, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Appeal. Words, "A party aggrieved."

Under R. L. c. 159, § 19, amended by St. 1911, c. 284, § 1, one of two defendants in a suit in equity cannot appeal from a final decree which as to him orders that the bill be dismissed, he not being "a party who is aggrieved" by such decree. Under R. L. c. 159, § 19, as amended by St. 1911, c. 284, § 1, a defendant in a suit in equity, as against whom a bill is dismissed by a decree that orders his co-defendant to pay a sum of money to the plaintiff, is not "a party who is aggrieved" by such decree, from which his co-defendant does not appeal, by reason of the fact that he may be affected by the decree because he is a joint obligor with his co-defendant on a bond dissolving an injunction in the same suit.

CARROLL, J. This is a suit in equity by Samuel B. Donovan against Joseph A. Donovan and William Kirby. An injunction

issued, which was dissolved upon the filing of a bond executed by the defendants with surety in favor of the then plaintiff. Later Annie M. Donovan was joined as a plaintiff. On the report of the master to whom the case was referred, a decree was entered* ordering the defendant Joseph A. Donovan to pay the plaintiff Samuel B. Donovan the sum of \$6,782.59, and to pay the plaintiff Annie M. Donovan the sum of \$512.81. No appeal was taken by the defendant Donovan. The decree ordered the bill dismissed as to Kirby, and from this decree Kirby appeals.

"A party who is aggrieved by a final decree of a justice of the Supreme Judicial Court or a final decree of the Superior Court may . . . appeal therefrom." R. L. c. 159, § 19. St. 1911, c. 284, § 1. See *Griffin v. Griffin*, 222 Mass. 218. Where a finding is in a party's favor, he is not a person aggrieved and cannot appeal. *Langley v. Conlan*, 212 Mass. 135, 140. *Smith v. Dickinson*, 140 Mass. 171. *Hayden v. Stone*, 112 Mass. 346.

The liability of Kirby, if any, as a joint obligor of the bond to Samuel B. Donovan, see *Prior v. Pye*, 164 Mass. 316, does not make him a party who is aggrieved by the decree. The statute gives the party to the suit the right to appeal from an adverse decree, and he must be aggrieved as a party, and not collaterally, in order to exercise this right. The surety on a bond is not a party to the suit and of course cannot appeal; and because as one of the obligors of the bond Kirby may be affected by the decree, he is not given the right of a party to appeal therefrom. *Estate of McDermott*, 127 Cal. 450. *Berthold v. Fox*, 21 Minn. 51. *Shaw v. Humphrey*, 96 Maine, 357. *Richardson v. Chevalley*, 26 La. Ann. 551. *Lake Bisteneau Lumber Co. Ltd. v. Sheriff*, 49 La. Ann. 1294. *Farrar v. Parker*, 3 Allen, 556, arose under Gen. Sts. c. 117, § 8, now R. L. c. 162, § 9, giving to a person aggrieved by a decree of the Probate Court the right to appeal, it was there decided that the surety on a guardian's bond came within the meaning of the statute and was a person aggrieved by the decree, although not a party to the proceeding, the court explaining that probate appeals include "a wider range of persons than those entitled to an appeal in other courts." In the case at bar Kirby may be a person aggrieved, but his grievance, if any, against the decree arises out of the fact

* In the Superior Court, by order of *Wait*, J.

that he signed and executed a bond, not because he is a party to the suit.

Appeal dismissed.

W. A. Parker, for the defendant Kirby, submitted a brief.

M. H. Sullivan, for the plaintiff.

NASHUA RIVER PAPER COMPANY *vs.* HAMMERMILL PAPER
COMPANY.

Suffolk. October 22, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Validity. Jurisdiction.

A provision, in an ordinary commercial contract in writing between a Massachusetts corporation and a Pennsylvania corporation, that the Massachusetts corporation shall not sue the Pennsylvania corporation except in the courts of Common Pleas in the State of Pennsylvania, is void and cannot be enforced to deprive the courts of this Commonwealth of jurisdiction. Following the rule in *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, and explaining *Daley v. People's Building, Loan & Saving Association*, 178 Mass. 13, and *Mittenhal v. Mascagni*, 183 Mass. 19.

CONTRACT for \$13,350.19. Writ dated May 12, 1914.

The declaration (omitting an account annexed) was as follows:

"The defendant owed the Nashua River Paper Corporation \$13,350.19 according to the account hereto annexed and said Nashua River Paper Corporation by an instrument in writing duly assigned the defendant's said obligation to one Harris H. Gilman, and said Gilman by a like instrument duly assigned the same to the Babbatasset Paper Company, and said Babbatasset Paper Company by a like instrument duly assigned the same to the plaintiff, so that the defendant owes the plaintiff said sum of \$13,350.19."

The defendant filed the following plea in abatement:

"And now comes Hammermill Paper Company, appearing specially and not consenting to the jurisdiction of this court, and for answer in abatement says that all the transactions between the defendant and the Nashua River Paper Corporation set forth

or referred to in the plaintiff's declaration took place under a special contract between the defendant and the Nashua River Paper Corporation dated December 1, 1910, a copy whereof marked 'A' is hereunto annexed and made a part hereof; that by paragraph 11 of said contract 'It is stipulated and agreed that no action at law, equity or chancery shall be instituted or maintained by the Corporation in any court of any State of the United States or in any circuit or district court of the courts of the United States against the Company other than in the courts of the Common Pleas of the State of Pennsylvania;' that under the said contract the Nashua River Paper Corporation could not and cannot institute or maintain the present cause in this honorable court; and that the plaintiff cannot institute or maintain this action in this court.

"Wherefore the defendant says that this court has no jurisdiction of this action and that the writ should be abated and the action dismissed."

The defendant also filed an answer in bar, in which in the first paragraph, preceding a general denial and an allegation of payment, it set up, without waiving its answer in abatement but relying thereon, the same objection to the jurisdiction of the court set up in its answer in abatement and in the same words, except that instead of the short concluding paragraph of the answer in abatement this part of the answer in bar concluded as follows: "that under the said contract the Nashua River Paper Corporation could not and cannot institute or maintain the present cause in this honorable court; and that the plaintiff cannot institute or maintain this action in this court."

By amendment there was added to the answer in abatement and also to the first paragraph of the answer in bar the allegation, "that the said special contract between this defendant and the Nashua River Paper Corporation, a copy whereof marked 'A' is annexed to and made a part of said answer, notwithstanding the recitals therein, was executed and delivered by the parties thereto one to the other at Boston in said county of Suffolk."

The plaintiff demurred to the answer in abatement as amended and to the first paragraph of the answer in bar as amended, and alleged as causes for each demurrer the following:

"1. Said answer [paragraph] states no ground for abatement

[legal defence to the declaration] in accordance with the rules contained in R. L. c. 173.

"2. The provision in the contract referred to in said answer [paragraph] assuming to restrict the courts in which actions on said contract may be brought is collateral to the main contract and is not a ground for the abatement of the writ herein [defence to this action].

"3. The provision in the contract referred to in said answer [paragraph] assuming to restrict the courts in which actions on said contract may be brought is ineffectual to restrain the exercise by this court of its jurisdiction over the parties and the subject matter of this action.

"4. The provision in the contract referred to in said answer [paragraph] assuming to restrict the courts in which actions on said contract may be brought is contrary to public policy, illegal and void."

The case came on to be heard upon the demurrers before *Morton, J.*, who ordered that the demurrers be overruled, and, being of opinion that these orders ought to be determined by this court before any further proceedings in the Superior Court, at the request and by agreement of the parties, reported the case for such determination.

The contract, of which a copy marked "A" was annexed to the answer in abatement and to the answer in bar, was as follows:

"This agreement made this, first day of December, One Thousand Nine Hundred and Ten (1910) at Erie, Pa., Millcreek Township, Erie County, by and between the Nashua River Paper Corporation, a corporation organized under the laws of the Commonwealth of Massachusetts and having its usual place of business at Boston in the said Commonwealth (hereinafter called the Corporation) and the Hammermill Paper Company, a corporation organized under the laws of the Commonwealth of Pennsylvania and having its usual place of business at Erie, in the said Commonwealth (hereinafter called the Company).

"Witnesseth: —

"Whereas, the Corporation is engaged in the business of manufacturing paper and desires to make the company its sole and exclusive selling agent for its product, and

"Whereas, the Company is desirous of becoming the sole and exclusive selling agent for the product of the Corporation.

"1. Now this agreement witnesseth, that the Corporation in consideration of the covenants hereinafter contained to be performed on the part of the Company constitutes the Company the sole and exclusive selling Agent for the product of the Corporation, under the terms and conditions as hereinafter stated.

"2. The Corporation agrees to manufacture merchantable and marketable paper of such grades, qualities and sizes as the mills of the Corporation are equipped to manufacture and as may be ordered from time to time by the Company.

"3. The Company agrees to sell the product of the Corporation at the best market price that the Company can obtain therefor, and to use due diligence in selling the product of the Corporation. The President of the Corporation or any man he may designate and the Executive Committee of the Company or any man it may designate shall meet once a month or such other times as they may agree upon for the purpose of fixing the minimum price of the paper manufactured by the Corporation at which the same may be sold by the Company for the succeeding month or until changed by the Corporation and the Company at some future meeting. The minimum price so fixed shall be continued until changed by the parties hereto.

"4. All paper ordered by the Company from the Corporation shall be billed to the Company at the prices designated in the order which shall be the prices at which the paper is sold by the Company less 3% commission and the Company agrees to pay therefor in three equal payments on the 10th, 20th and 30th respectively of the month following the month in which the paper is shipped according to instructions of the Company.

"5. All paper ordered by the Company from the Corporation shall be shipped f. o. b. point of destination from the mills of the Corporation to such places as the Company may direct.

"6. All disputes between the Company and the purchasers from it of the said paper manufactured by the Corporation as to quality, imperfections or damage by reason of imperfect packing for shipment, shall be settled by the Company, and all losses for paper rejected by the purchasers from the Company due to inferior

quality, imperfections or improper packing of the same for shipment, through which damage may result, shall be borne by the Corporation.

"7. The Company agrees to use its best efforts at all times to sell the entire product of the Corporation. In consideration of the Corporation paying to the Company a commission of 3 % on the entire sales of said Corporation and in further consideration of the Corporation turning all their sales accounts and orders for paper now on their books over to the Company, said Company agrees in the event of the inability to sell the entire product of said Corporation and to keep the mills of the Corporation running to their full capacity due to any reason not within control of the Company so to pro-rate in tons orders for such grades of paper as are manufactured by both the Company and the Corporation in such amounts as correspond to the respective total outputs in tons of said Company and of said Corporation.

"8. It is further agreed that such paper as may be ordered by the Company for future delivery and which shall be manufactured by the Corporation and carried in storage shall be at the expense of the Company, and shall be treated as belonging to the Company, as if the same had actually been delivered to them. And such paper shall be insured by the Corporation and the insurance premium paid by it.

"9. The Corporation shall at all times be required to use its best efforts in the manufacture of merchantable and marketable paper, but shall not be responsible for its failure to do so when such failure shall be caused by the act of God, strikes, fire or by acts of the public enemy, but shall be relieved of the responsibility under this contract during the time of the existence of such causes.

"10. The agreement shall be binding between the parties hereto and shall continue in full force and effect for a period of fifteen years from the date hereof, but it is agreed that if Ernst R. Behrend shall cease to be an officer with the Company or the Corporation, the Company or the Corporation may by one year's notice to the other in writing terminate this agreement.

"11. It is stipulated and agreed that no action at law, equity or chancery shall be instituted or maintained by the Corporation in any Court of any State of the United States or in any circuit or district court of the courts of the United States against the

Company other than in the Courts of the Common Pleas of the State of Pennsylvania.

"In witness whereof the parties hereto have caused this agreement to be signed on their behalf by their respective officers hereunto duly authorized and have caused their common and corporate seals to be hereunto affixed the day and year first above written.

Nashua River Paper Corporation
By Charles H. Clinton
President.

Hammermill Paper Company
By Ernst R. Behrend
President."

Through mesne assignments the plaintiff had acquired the rights of the Nashua River Paper Corporation.

H. S. Davis, for the plaintiff.

J. B. Studley, (*R. Weston* with him,) for the defendant.

RUGG, C. J. The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that "no action at law, equity or chancery shall be instituted or maintained by the Corporation in any Court of any State of the United States or in any circuit or district court of the courts of the United States against the Company other than in the courts of the Common Pleas of the State of Pennsylvania." This stipulation occurs in an ordinary commercial contract between a corporation incorporated and domiciled in this Commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy

for a breach of contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not given decisive weight. Chief Justice Shaw, in concluding the discussion, said: "The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies." In *Hall v. People's Mutual Fire Ins. Co.* 6 Gray, 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the county of Worcester. Chief Justice Shaw, in giving the opinion of the court, after adverting to *Nute v. Hamilton Mutual Ins. Co.* as substantially deciding the question, said: "The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought. . . . It is a well settled maxim, that parties cannot, by their consent, give jurisdiction to courts, where the law has not given it; and it seems to follow from the same course of reasoning, that parties cannot take away jurisdiction, where the law has given it." The same point was decided in *Amesbury v. Bowditch Mutual Fire Ins. Co.* 6 Gray, 596, 603. In *Roberts v. Knights*, 7 Allen, 449, it was held that a British subject, who had shipped in England as seaman for an entire voyage under a statutory law which provided that under such contract no seaman should sue for wages in any court abroad except in case of discharge or danger to life, nevertheless might bring an action against the master of the vessel although both parties were residents of Great Britain. It commonly has been thought that "such law enters into the terms of the contract and becomes a part of its obligation." *Hanscom v. Malden & Melrose Gas Light Co.* 220 Mass. 1, 7. Therefore, the refusal of the court to give any heed to the British statute is significant, although there was no discussion of the point here raised. These cases generally have been understood as supporting the proposition

that parties could not contract that their disputes arising under the contract should be litigated in a single court or in the courts of a particular jurisdiction.

It was held in *Home Ins. Co. v. Morse*, 20 Wall. 445, that a statute making it a condition precedent to the granting of the privilege to a foreign corporation to do business within a State, that it would not remove suits from State to federal courts, was unconstitutional and a contract to that effect was invalid. It there was said, at page 451: "A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." This point was reaffirmed expressly in *Doyle v. Continental Ins. Co.* 94 U. S. 535. This principle has been followed in numerous decisions of circuit and district federal courts. *Prince Steam-Shipping Co. v. Lehman*, 39 Fed. Rep. 704. *Slocum v. Western Assurance Co.* 42 Fed. Rep. 235. *The Etona*, 64 Fed. Rep. 880. *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 Fed. Rep. 174. *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. Ltd.* 222 Fed. Rep. 1006.

It was held in *Benson v. Eastern Building & Loan Association*, 174 N. Y. 83, 86, in substance that parties cannot in the ordinary case by contract deprive courts of competent jurisdiction of their power to adjudicate causes on the ground that that jurisdiction is prescribed by law and it cannot be increased or diminished by agreement of parties. In *Mutual Reserve Fund Life Association v. Cleveland Woolen Mills*, 27 C. C. A. 212, at page 214, it was said by Lurton, J.: "The policy [of insurance] . . . contained a stipulation that no suit in law or equity should be brought upon it except in the circuit court of the United States. This provision, intended to oust the jurisdiction of all State courts, is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to

public policy, and should not be enforced." To the same effect, see *Savage v. People's Building, Loan & Savings Association*, 45 W. Va. 275, 282; *Bartlett v. Union Mutual Fire Ins. Co.* 46 Maine, 500; *Reichard v. Manhattan Life Ins. Co.* 31 Mo. 518; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind. 25; *Baltimore & Ohio Railroad v. Stankard*, 56 Ohio St. 224; *Owsley v. Yerkes*, 109 C. C. A. 250; *First National Bank of Kansas City v. White*, 220 Mo. 717, 737; *Healy v. Eastern Building & Loan Association*, 17 Penn. Sup. Ct. 385, 392, 393; *Matt v. Iowa Mutual Aid Association*, 81 Iowa, 135; *Shuttleworth & Co. v. Marx & Co.* 159 Ala. 418, 428.

In many of these cases the opinion of this court by Chief Justice Shaw in *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, has been cited and relied on as an authority. Attempts to place limitations by contract of the parties upon the powers of courts as to actions growing out of the particular contract, or to oust appropriate courts of their jurisdiction, have been regarded with disfavor and commonly have been held invalid. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & Melrose Railroad*, 139 U. S. 137, 140. *Meacham v. Jamestown, Franklin & Clearfield Railroad*, 211 N. Y. 346, 352, 353. It might be argued with force that the law as to the enforcement of rights arising out of personal injuries was imported into the terms of a contract for hire. Yet it has been decided that statutory limitations, to the effect that a right of action for personal injuries shall be confined to the State where it occurred, are invalid. *Atchison, Topeka & Santa Fe Railway v. Sowers*, 213 U. S. 55, 70. *Tennessee Coal, Iron & Railroad Co. v. George*, 233 U. S. 354.

So far as we are aware, the current of authority (with the exceptions presently to be noted) is unbroken in support of the principle laid down in *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. Ltd.* 222 Fed. Rep. 1006. There are two of our own cases where the principle was not applied and which appear to be exceptions to it. In *Daley v. People's Building, Loan & Saving Association*, 178 Mass. 13, an action was brought by a citizen of this Commonwealth which involved the construction of a condition contained in his certificate of membership in the defendant corporation, to the effect that "Any

action brought against this association by any shareholder shall be brought . . . in the county of Ontario, State of New York." It was held that this condition of the contract should be enforced. After stating that it was not meant to overrule *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, the court said: "Here we are dealing with a New York corporation, most of whose members would live in New York, and the greater part of whose dealings and contracts naturally would take place also in New York. There, we take it from *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28, which was put in evidence, the condition would be an answer to an attempt to sue in another county. The condition, at least so far as we have occasion to consider it, refers to suits by members of the corporation as such. It is perfectly reasonable, and as applied to a New York corporation in view of the New York law cannot be held contrary to the policy of Massachusetts with regard to such contracts as happen . . . to be concluded on this side of the boundary line. . . . It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power, and that our decision as to the validity of the condition as a defence does not go beyond the particular circumstances of this case." It is obvious that the assumption based upon *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28, that such a contract would be valid under the laws of New York, was an important factor in the reasoning of the court. The Daley case was decided in February, 1901. It was held, however, in *Benson v. Eastern Building & Loan Association*, 174 N. Y. 83, 86, decided in March, 1903, that *Greve v. Aetna Live Stock Ins. Co.* did not state correctly the law of New York, and precisely the same condition that was before this court in *Daley v. People's Building, Loan & Saving Association* was there adjudged to be invalid and unenforceable. If the Benson case had been decided earlier than the Daley case, and the law of New York had been proved in the Daley case, as declared finally and conclusively in the Benson case, instead of the erroneous view put forward in the decision of the Greve case by an inferior court, an important link in the chain of reasoning by which the conclusion in the Daley case was reached would have been wanting. The binding force of such a decision is open to question. *Kapiolani v. Atcherley*, 238 U. S. 119. The reasoning and ground of the decision well might have

been different, although possibly the result might have been the same upon the ground that certificates of membership in the New York corporation were accepted with the inherent limitation and restriction explained at length in *Longyear v. Hardman*, 219 Mass. 405. As the decision in the Daley case was expressly confined to its own peculiar circumstances, it can hardly be considered as substantially narrowing the authority of *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174.

In *Mittenthal v. Mascagni*, 183 Mass. 19, the parties were both non-residents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various States of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were non-residents, they had no standing in the courts of this State as matter of strict right, but only as matter of comity. *National Telephone Manuf. Co. v. DuBois*, 165 Mass. 117. It, therefore, was regarded as appropriate to yield to the terms of a contract between the parties having such obvious foundation in convenience and reason, although the court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens. *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, was referred to in the opinion and not treated as overruled.

In this connection *Palmer v. Lavers*, 218 Mass. 286, 291, may be adverted to, where it was said that "where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of the court of first instance shall be final, that agreement does not come within that principle [that is, the principle of *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174], and that it is an agreement which is

binding and will be enforced." That decision has no relevancy to the question now presented. Nor is the question here raised, whether the parties may by contract provide that their respective rights growing out of the agreement shall be determined according to the law of a particular jurisdiction. See *Brandeis v. Atkins*, 204 Mass. 471, 476; *Pritchard v. Norton*, 106 U. S. 124, 136; *Greer v. Poole*, 5 Q. B. D. 272, 274.

The Daley and Mittenthal cases, as to the points adjudicated, while not extending the doctrine of the Nute case, do not overrule it and are not inconsistent with it. All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. The Nute case lays down the general principle. The other two cases stand as sound upon their several states of facts. To extend them to the present case involves overruling the Nute case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court in *Home Ins. Co. v. Morse*, 20 Wall. 445, and *Doyle v. Continental Ins. Co.* 94 U. S. 535. The same rule prevails generally in all States where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest and which may be broadly operative as to jurisdiction, should be held valid in one State and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable and that, therefore, the action can be maintained in the courts of this Commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and to the part of the answer in bar setting up the same matter must be sustained. The case is to stand for disposition upon the issues raised by the answer to the merits.

So ordered.

JAMES ASHTON, administrator, vs. FALL RIVER GAS WORKS
COMPANY.

Bristol. October 25, 1915. — February 12, 1916.

Present: LORING, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Causing death: due care of decedent.

In an action by an administrator against a gas company under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for negligently causing the death of the plaintiff's intestate by permitting gas to enter the pipes in a tenement, into which the intestate and his wife had moved four days before, when the intestate had reason to believe that the gas was shut off from the tenement, it appeared that the body of the intestate was found seated in a chair in his kitchen holding a gas fixture or chandelier which had been unscrewed from the gas pipe above, that on a table in front of the body were a rag and some cleaning material, that the body of the intestate's wife was found lying on a bed in an adjoining room, that both the intestate and his wife had died from gas poisoning, and that the intestate last was seen alive entering his tenement five hours before his body was found. The presiding judge refused to rule that the plaintiff could not recover, and the jury returned a verdict for the plaintiff. On exceptions by the defendant, it was *held*, that, there being no circumstances from which it could be inferred that the intestate was actively in the exercise of due care as required by the statute, the exceptions must be sustained, and judgment was ordered for the defendant under St. 1909, c. 236.

TORT under R. L. c. 171, § 2, as amended by St. 1907, c. 375, by the administrator of the estate of George Hoskar, late of Fall River, for negligently causing the death of the plaintiff's intestate by gas poisoning on April 5, 1913. Writ dated May 5, 1913.

In the Superior Court the case was tried before *White, J.* The evidence is described in the opinion. At the close of the evidence, the defendant, among other requests, asked the judge to make the following rulings:

"1. On the whole evidence the plaintiff is not entitled to recover."

"5. There is no evidence in this case that the deceased was actually and actually in the exercise of due diligence."

The judge refused to make these and other rulings requested by the defendant, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,750. The defendant alleged exceptions.

A. J. Jennings, (I. Brayton with him,) for the defendant.

J. A. Kerns, for the plaintiff.

CARROLL, J. The plaintiff's intestate, George Hoskar, occupied the lower east tenement of a four-tenement building. He was last seen alive shortly after nine o'clock in the morning of April 5, 1913. He was then about to enter his own tenement. At two o'clock in the afternoon of that day he was found sitting on a chair in his kitchen, dead, from illuminating gas. Near by, or as one witness testified, in the hands of the deceased, was a gas fixture or chandelier which had been unscrewed from the gas pipe above, and there was a rag and some cleaning material on the table in front of him. The doors and windows were closed. It does not appear that the door or doors to the tenement were locked, but, when the smell of gas was noticed, an inspector from the gas company was called to the house, rapped at the door of the Hoskar tenement, and receiving no response went into the yard and opening one of the windows climbed into the room. Mrs. Hoskar was found lying on a bed in an adjoining room, dead from gas poison.

In the cellar of the house there were four shelves, on three of which there were gas meters. The main gas supply extended near the ceiling, above the shelves, and from this main pipe were four T's, one over each meter. The T above the vacant shelf was plugged. There were formerly four separate risers or uprights leading from the cellar, one to each tenement. From March, 1912, to February or March, 1913, one Walton occupied the two lower tenements. When he took possession, the risers for the two lower tenements were connected by a pipe, so that one meter served for both the lower tenements. When Walton moved out, "the meter connected with the two lower tenements was removed from the building by the defendant." In March, 1913, Mary Connelly moved into the lower west tenement, the other tenement on that floor being unoccupied. Gas was installed for her tenement and a meter set up. There were then three meters, each one on its own shelf and the fourth shelf was vacant. When the work was done by the defendant, no change was made in the risers, so that both the east and west tenements were supplied with gas through one meter which measured the supply for both. April 5, 1913, was Saturday, and on the Tuesday before (April 1), Hoskar

and his wife moved into the lower east tenement. One witness stated that he saw Hoskar on the night before his death and asked him if he had "got all straightened out," and Hoskar said, "Yes, we are pretty nearly all ready, only I am waiting on the gas."

Assuming that the defendant was negligent in permitting the gas to flow through the pipes of the lower east tenement when it was turned on for the Connelly tenement, and, by the peculiar arrangement of the pipes and meter, misleading the occupant of the east tenement to suppose there was no gas in his premises; and assuming that on the night before the fatality the deceased was misled and believed his tenement to be then without a supply of gas; still we are unable to find any evidence of that attention to his own safety and protection required at common law. If that is so, then there is none within the statute under which this action is brought.

Even if the doors were unlocked, we can find nothing in the record indicating any attempt on the part of the deceased to avoid the danger or to secure assistance. It may be that the gas escaped in such volume, was so insidious, and he was so suddenly overcome, that it was impossible to get away from the poison, open the door, or secure assistance; but we have no evidence whatever bearing on these questions. We can only conjecture. There is nothing showing the amount of gas which escaped, or within what time he was rendered insensible. Even if these facts were established, we do not decide that there then would be sufficient evidence to show the exercise of proper care. On Friday he supposed his tenement was free from gas. Assuming he was still ignorant of existing conditions on Saturday morning, there is nothing to show that he took any precautions whatever before he unscrewed the gas fixture, or why it was necessary to remove this fixture, even if he wished to clean it. In short, there is nothing indicating any effort on the part of the deceased to protect or save himself, and no circumstances appear showing how the accident happened, from which an inference can be drawn establishing his due care. What happened between nine o'clock in the morning and the time he was found dead, is "wholly a matter of conjecture, where one hypothesis as to what he did is as good as another, and therefore no inference of due care can be drawn affirmatively." Braley, J., in *Chester v. Murtfeldt*, 216 Mass. 537,

539. *Lydon v. Edison Electric Illuminating Co.* 209 Mass. 529.
MacDonald v. Edison Electric Illuminating Co. 208 Mass. 199.

It follows that the defendant's exceptions must be sustained, and judgment is to be entered for the defendant, in accordance with St. 1909, c. 236.

So ordered.

THOMAS MADY vs. HOLY TRINITY ROMAN CATHOLIC POLISH CHURCH.

Bristol. October 26, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Implied in law. *Religious Society*. *Evidence*, Matters of common knowledge. *Practice*, Civil, Judge's charge. *Jury and Jurors*.

Where a religious corporation, whose trustees voted to dispense with the services of its priest, thereafter for more than a year accepted such services which he continued to perform, it can be found to be liable to pay for the services.

At the trial of an action against a religious corporation, calling itself Roman Catholic and seeking to be accepted by the Roman Catholic Church but not so accepted, to recover compensation for services performed as a priest after the trustees of the defendant had voted to dispense with his services, where there has been no evidence in regard to the polity or laws governing the Roman Catholic Church, it is error for the presiding judge in instructing the jury to say to them, "No doubt it would have been the duty under the polity of the Roman Catholic Church for him [the plaintiff] to stay there until his successor was brought there," and to say further, "So far as the matter of the church polity of the Catholic Church is concerned, you are to use it no further than you have a common knowledge of it. Whether according to that a priest is expected to stay there until he is discharged, not by the parish, not by the church, but by some authority higher than the church, is for you, and if you have not any common knowledge about it, why, you are not to use any knowledge about it."

The polity or mode of government of the Roman Catholic Church is not a matter of common knowledge.

While a juror properly may apply his general knowledge and experience to the subject of inquiry and in determining the weight and credibility of the evidence, he is not permitted to act upon his private knowledge of particular facts which are not matters of common knowledge.

CONTRACT against the Holy Trinity Roman Catholic Polish Church, a religious corporation conducting worship in the city of Fall River, for \$1,500 alleged to be due to the plaintiff for services as priest and for disbursements. Writ dated March 17, 1914.

In the Superior Court the case was tried before *White, J.* The evidence is described in the opinion. At the close of the evidence the defendant, among other requests, asked the judge to make the following rulings:

"6. That after the plaintiff knew the defendant would not pay him, no implied promise to pay could exist.

"7. The plaintiff must reasonably have expected that the defendant would pay him in order to create an implied promise to pay.

"8. The defendant was not obliged to put the plaintiff off its property bodily to prevent an implied contract to pay him from forming.

"9. In order that the plaintiff may recover for services upon an implied contract from November, 1912, to the time of his leaving, he must show that his services were those of a Christian priest."

The judge refused to make these rulings. The jury returned a verdict for the plaintiff in the sum of \$1,385; and the defendant alleged exceptions, including an exception to the portion of the judge's charge which is quoted in the opinion.

J. A. Kerns, for the defendant.

D. R. Radowsky, for the plaintiff.

CROSBY, J. This is an action of contract to recover for services alleged to have been rendered as priest of the defendant's church in Fall River from September, 1911, to February 3, 1914. The plaintiff admits that he was paid in full for his services to June 1, 1912.

The auditor finds that when the plaintiff began to render services in September, 1911, "he made no claim for compensation as salary, but asked the parish to supply him with a church and an altar and his keep." The auditor also finds that later a committee of the parish called upon him and it was arranged that he should receive \$50 a month and the use of a house, heated, lighted and furnished; that subsequently, in the autumn of 1911, a housekeeper was engaged to care for the parish residence, and the compensation of the plaintiff was made \$66.66 a month, from which the wages of the housekeeper, \$20 a month, were to be paid by the plaintiff.

There was evidence to show that on November 19, 1912, a meet-

ing of the trustees of the defendant corporation was held, at which meeting it was voted in effect that the plaintiff's services were no longer desired. Aside from the legality of the call for this meeting or the validity of the vote passed, it was in substance an attempt to dismiss the plaintiff from further service as priest of the parish. At a meeting of the parish held on December 5, 1912, a similar vote was passed, and there was evidence that the plaintiff knew of both of these votes. The plaintiff continued to occupy the rectory of the church and offered evidence to show that he continued to perform the functions of priest as formerly until February, 1914.

The defendant contended that the plaintiff and the defendant were engaged in a common purpose in establishing a church and seeking to have it included within the jurisdiction of the Roman Catholic Church, and that the plaintiff would not ask compensation for his services until the desired object had been accomplished. The plaintiff denied that he was to serve without compensation. The defendant also contended that, after the votes of the trustees and of the parish above referred to had been passed, any liability to pay the plaintiff for future services was terminated.

The auditor finds that "It was desired by the trustees and the people of the parish that their church should receive the sanction of the Catholic Church of Fall River," and that "the Bishop refused to accept their proposals or take over the church."

The questions whether any binding contract had been entered into by the parties and, if so, whether it had been terminated by the defendant, and, if terminated, whether the defendant thereafter accepted the plaintiff's services upon an implied understanding that he should be paid therefor, were properly submitted to the jury upon the findings of the auditor and upon the other evidence.

The defendant's sixth request could not have been given because, if the defendant accepted the services of the plaintiff after he had been notified in November and December, 1912, that such services were no longer required, it would be liable upon an implied promise to pay, and the presiding judge so instructed the jury. The seventh and eighth requests were sufficiently covered in the charge. The ninth request could not have been given, as there was evidence that the plaintiff had been ordained as a priest

and there was no evidence to the contrary; besides he had acted in that capacity in the defendant's parish from September, 1911, to February, 1912, without any question having been raised as to his qualifications.

The judge instructed the jury in part as follows: "No doubt it would have been the duty under the polity of the Roman Catholic Church for him [the plaintiff] to stay there until his successor was brought there." The defendant excepted to this part of the charge "for the reason that it does not appear that that is the doctrine of the Roman Catholic Church." The judge then further instructed the jury in part as follows: "So far as the matter of the church polity of the Catholic Church is concerned, you are to use it no further than you have a common knowledge of it. Whether according to that a priest is expected to stay there until he is discharged not by the parish, not by the church, but by some authority higher than the church, is for you, and if you have not any common knowledge about it, why, you are not to use any knowledge about it."

We are of opinion that the polity of the Roman Catholic Church is not a matter of common knowledge, and that the jurors properly could not have been permitted to take into account their knowledge upon the subject, if they had any, in determining the question whether the defendant had authority to dismiss the plaintiff in November or December, 1912. Undoubtedly jurors properly may take cognizance of facts that are generally regarded as forming a part of the common knowledge of all persons of ordinary understanding and intelligence. *Commonwealth v. Peckham*, 2 Gray, 514. *Commonwealth v. Marzynski*, 149 Mass. 68, 72. *Commonwealth v. Pear*, 183 Mass. 242, 246. Facts which ordinarily are not known without the aid of expert testimony or other proof cannot be said to be matters of common knowledge. No testimony was offered at the trial to show the polity or laws governing the Roman Catholic Church, but the jury were allowed to act upon such polity in the absence of any evidence upon that subject.

According to the general practice of the courts in most, if not all, jurisdictions, proof is required upon the subject of church polity or government whenever that subject has arisen. It is also held that the civil rights and duties of a religious denomina-

tion are not matters of common knowledge. Courts cannot take judicial notice of laws governing churches, or of the nature and powers or the civil rights and obligations of religious organizations. *Baxter v. McDonnell*, 155 N. Y. 83. *Katzer v. Milwaukee*, 104 Wis. 16. *Hill Estate Co. v. Whittlesey*, 21 Wash. 142. *Beckwith v. McBride & Co.* 70 Ga. 642.

While a juror properly may apply his general knowledge and experience in regard to the general subject of inquiry and in determining the weight and credibility of the evidence, he is not permitted to act upon his private knowledge of particular facts which are not a matter of common knowledge or observation. *Schmidt v. New York Union Mutual Fire Ins. Co.* 1 Gray, 529.

The defendant corporation undoubtedly was organized as a religious association to be conducted as a Roman Catholic Church. Still it had not received the sanction of the bishop of the diocese, and he had refused it admission under the jurisdiction of the church. Under these circumstances it would seem that the defendant was not governed by the polity or laws of the church, or necessarily controlled by its rules.

As the polity of the Roman Catholic Church is not a matter of common knowledge and so properly could not have been passed upon by the jury, the entry must be

Exceptions sustained.

JOSEPH OLSZEWSKI vs. ELLIS GOLDBERG.

Bristol. October 26, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Witness, Impeachment. Evidence, Competency, Of criminal record. Practice, Criminal, Plea of nolo contendere.

A record of a conviction following a plea of *nolo contendere* cannot be used in another proceeding to affect the credibility as a witness of the person so convicted.

TORT for personal injuries received by the explosion of a dangerous article negligently included within a "prize package" sold to the plaintiff by the defendant. Writ dated November 3, 1913.

In the Superior Court the case was tried before *King, J.* The material facts are described in the opinion. There was a verdict for the plaintiff in the sum of \$1,000. The defendant filed a motion for a new trial on the ground, among others, of newly discovered evidence as to a mistake in a record of conviction introduced by the plaintiff to affect the credibility of the defendant's witness Willis. The judge denied the motion, "being of the opinion that the record, even if it had been accurate as to the plea of the said Willis, and the action of the court thereon, would have been admissible in evidence for the purpose for which it was offered." The case was reported to this court with the stipulation of counsel that, if the ruling was wrong and the evidence was inadmissible in evidence, then the verdict was to be set aside and a new trial granted; otherwise, judgment was to be entered for the plaintiff upon the verdict.

D. R. Radovsky & L. Goldberg, for the defendant, submitted a brief.

G. L. Ellsworth, (*C. N. Serpa* with him,) for the plaintiff.

CARROLL, J. Ellis W. Willis was a witness for the defendant. To affect the credibility of the witness, a record showing his conviction upon a plea of guilty of the sale of an air gun to a minor was introduced. Later it was found that there was an error in the record, that Willis had been convicted on a plea of *nolo contendere*. There was a verdict for the plaintiff.

On a motion for a new trial by the defendant, the judge reported the case, stating that in his opinion "the record, even if it had been accurate as to the plea of the said Willis, and the action of the court thereon, would have been admissible in evidence for the purpose for which it was offered."

In *Commonwealth v. Tilton*, 8 Met. 232, 233, Shaw, C. J., said: "This plea (*nolo contendere*) like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but it is not to be used as an admission elsewhere." Such a plea is in fact a confession, upon which, if accepted, the defendant may be sentenced, and so far as the procedure in the particular case is concerned, is equivalent to a plea of guilty. In this Commonwealth it is now settled that a conviction following a plea of *nolo contendere*, cannot be used in another proceeding to affect the credibility of a witness. It was not admissible in the case at bar.

White v. Creamer, 175 Mass. 567. *Commonwealth v. Ingersoll*, 145 Mass. 381. *Commonwealth v. Horton*, 9 Pick. 206.

According to the terms of the report, the verdict is to be set aside and a new trial granted.

So ordered.

MARY E. YOUNGERMAN, administratrix, vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 29, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Passenger. Railroad. Carrier. Negligence, Of person on premises of railroad corporation, Causing death.

No contract giving rise to the relation of carrier and passenger will be implied on the part of a railroad corporation from mere passive acquiescence on its part in a customary use, by persons intending to board its trains as passengers when the trains stopped at a certain station, of a portion of its premises near a track but separated from the station by two tracks and an open girder bridge.

Consequently there can be no recovery under St. 1906, c. 463, Part I, § 63, for causing the death of a person who, while standing at such place, was killed by a passing train, unless such person is shown to have been in the exercise of due care.

Where one, who, while standing upon a portion of the premises of a railroad corporation separated from a station by two parallel tracks and an open girder bridge without an express or implied invitation by the corporation and waiting for a train which was to stop at the station, occupied himself reading a newspaper and did not look nor listen for a train expected on the adjoining track, was struck and killed by the train, it cannot be found that he was in the exercise of due care and, since he was not a passenger, no action for causing his death can be maintained under St. 1906, c. 463, Part I, § 63.

TORT under St. 1906, c. 463, Part I, § 63, for causing the death of the plaintiff's intestate, Conrad Youngerman, on February 24, 1912, the declaration as amended containing two counts, the first count alleging that the deceased was not in the employ of the defendant, while the second count contained an allegation that he was a passenger of the defendant. Writ dated June 5, 1913.

In the Superior Court the case was tried before *White, J.* The material evidence is described in the opinion. At the close of the

evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

Joseph Wentworth, for the defendant.

CARROLL, J. At Field's Corner station, the defendant's railroad crosses Freeman Street by an overhead bridge. The station and platform are on the west, or left hand side of the tracks, looking toward Boston, and north of Freeman Street. On February 24, 1912, while standing on the opposite side of the tracks, a few feet south of the bridge spanning Freeman Street, and between the easterly rail of the inbound track and a retaining wall, the plaintiff's intestate was struck by an engine coming from the south, and instantly killed.

1. On the morning of his death the deceased came from Geneva Avenue, south of the station, passed to a vacant lot, thence to the top of the retaining wall on the east of the track, walking along this wall until near Freeman Street, when he stepped up a few feet to the level of the tracks, where he was standing when struck. There was abundant evidence that for several years it had been customary to use this means of approach to the trains. There were no notices prohibiting this use and no objection was made to it by the defendant, nor were passengers forbidden to enter cars on the east side of the tracks. It was usual for the last car of the train (which the deceased intended to board) to stop with the rear platform south of the Freeman Street bridge. The gate on the east side of this car was generally open, where it was the practice for passengers to enter. On the other hand, no preparations were made on the east side of the tracks for the reception of passengers. The arrangement of the station grounds showed plainly that the station platform, reached by a flight of steps from Freeman Street, west of the tracks and north of the street, was the only place designed and intended for passengers. The place where the plaintiff stood was separated from the station by two tracks and an open girder bridge; there is nothing in the evidence to show any express invitation by the defendant to use this side of the track or this mode of approach, nor is there anything in the conduct of the defendant from which such an invitation can be inferred. At most the defendant passively acquiesced or did not object to the use of the retaining wall as a means of access to

the station. From such negative conduct a contract will not be implied by the carrier, to assume the responsibility, for one who undertakes to enter its premises as a passenger under such circumstances, and stands at a place where an open bridge and the tracks are between him and the passenger platform. As stated by Hammond, J., in *Legge v. New York, New Haven, & Hartford Railroad*, 197 Mass. 88, 90, "Nor does it make any difference that he goes where others, with the knowledge of the railroad company, have gone before him, unless there is some invitation express or implied upon the part of the company. Knowledge of such use where proper arrangements have been otherwise provided does not of itself amount to such invitation." *Hyams v. Boston Elevated Railway*, 216 Mass. 560. *Hillman v. Boston Elevated Railway*, 207 Mass. 478. *Boden v. Boston Elevated Railway*, 205 Mass. 504. *Dodge v. Boston & Bangor Steamship Co.* 148 Mass. 207. *Hogner v. Boston Elevated Railway*, 198 Mass. 260.

2. If the deceased was not a passenger, in order to recover it must appear that he was in the exercise of due care. When reaching the top of the embankment he stood in a position of danger, near a track where a train was expected, and which must pass the place where he was standing, without looking and apparently without listening, reading a paper and making no effort whatever to save himself from danger. Such conduct is not the conduct of a man of ordinary prudence. "It is the duty of a person intending to enter a car upon a highway to take a position outside the reach of an approaching car. . . . The same rule has been applied where a person intending to board a train on a steam railroad stands too near the edge of the platform and is struck." *Neale v. Springfield Street Railway*, 189 Mass. 351, 353, and cases cited. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510.

As the plaintiff's intestate was not a passenger nor in the exercise of due care, she cannot recover. It is unnecessary to consider the question of the defendant's negligence.

Exceptions overruled.

EDYTHE M. KEMP & another, executors, vs. EDYTHE M. KEMP
& others.

Middlesex. December 1, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Devise and Legacy, What estate. Tax, On legacies and successions.

By the first article of his will, a testator gave to his wife the use of and income from all of his estate "for her support, comfort and enjoyment, and for any other purpose as she in her judgment may deem necessary," and further provided that, if the income in her judgment should be insufficient for her support, comfort and enjoyment, "or for any other purpose for which she may wish to spend money," she should have power to sell "any of my estate, real, personal and mixed," and to spend the proceeds arising from such sale for her support, comfort and enjoyment, and for any purpose for which she may wish to spend money, "and to convey and transfer by deed or other instrument in her own name for the above named purpose or for investment." By the next article of the will, the remainder undisposed of at the death of the widow was given to others. *Held*, that the estate received by the widow under the will was a life estate, and that an inheritance tax due to the Commonwealth should be computed accordingly.

BILL IN EQUITY, filed in the Probate Court on October 29, 1915, by the executors of the will of Horace G. Kemp, late of Cambridge, for instructions "as to the proper basis upon which to compute the inheritance tax due the Commonwealth of Massachusetts."

In the Probate Court a decree was entered that the estate given to the testator's widow Edythe M. Kemp was a life estate with a power of disposal to the extent set forth in the will; and that those named in Article 2 of the will took an estate in remainder subject to its being divested by an exhaustion of the estate, for the purposes mentioned in Article 1, by the life tenant in the exercise of good judgment and sound discretion; and that the inheritance tax due the Commonwealth was to be computed accordingly.

The widow appealed, and the case was reserved by *Braley, J.*, for determination by the full court.

E. B. Church, for the executors, stated the case.

H. R. Bailey, for the widow Edythe M. Kemp.

The following counsel were not called upon:

W. H. Powers, for Lysander S. Kemp.

W. Powers, guardian *ad litem* of Erford C. Kemp and of persons unascertained or not in being.

A. T. Smith, for the children of Lucyann Nowell.

W. H. Hitchcock, Assistant Attorney General for the Treasurer and Receiver General.

CARROLL, J. In the first article of the will of Horace G. Kemp, he gave to his wife the use of and income from all of his estate, "for her support, comfort and enjoyment, and for any other purpose as she in her judgment may deem necessary." If the income should be insufficient, in her judgment, for her support, comfort and enjoyment, "or for any other purpose for which she may wish to spend money," the power was given her to sell "any of my estate, real, personal and mixed," and to spend the proceeds arising from the sale for her support, comfort and enjoyment, or for any purpose she may wish to spend money, "and to convey and transfer by deed or other instrument in her own name for the above named purpose or for investment."

In Article 2, the remainder undisposed of at the death of Mrs. Kemp was given in equal shares to the children of his wife, the children of his sister and the children of his brother.

If Mrs. Edythe M. Kemp, the widow, became the owner in fee simple of the real estate and the absolute owner of the personal property under her husband's will, then, as stated in the bill, the inheritance tax will be at the rate of two per cent. If the children of Mrs. Kemp, and of his brother and his sister, take future interests, the tax will be at the rate of six per cent upon their respective shares.

If the will gave to Mrs. Kemp the unqualified title to the estate, with full power to dispose of it, so that she has an estate in fee simple in the real estate and absolute ownership of the personal property, this title is not to be cut down or taken away by inconsistent language imposing a limitation thereon. *Ide v. Ide*, 5 Mass. 500. *Collins v. Wickwire*, 162 Mass. 143. *Joslin v. Rhoades*, 150 Mass. 301. *Kelley v. Meins*, 135 Mass. 231. *Pitts v. Milton*, 192 Mass. 88. See *Whitman v. Huefner*, 221 Mass. 265.

The will gave to Mrs. Kemp the use of and income to be derived from the property, with a gift over of all that remains undisposed of at her death. No words of inheritance are used and the power given her is a power to sell for "her support, comfort and enjoyment, or for any other purpose for which she may wish to spend money," and "for investment." The power is "to sell . . . and

to convey and transfer by deed or other instrument." A power thus limited, as stated by Field, C. J., in *Kent v. Morrison*, 153 Mass. 137, 139, "by implication, excludes any power of conveying the property by will, and such a restriction upon the power of disposition is inconsistent with an estate in fee simple."

In *American Baptist Publication Society v. Lufkin*, 197 Mass. 221, the testator gave to his wife the residue of his estate to use and dispose of as she might think best for her interest and comfort, with a remainder over. She was not limited to a sale of the estate. She could use and dispose of it as she thought best for her comfort and use, and although the power was broad enough to permit her to dispose of the estate by will, if for her best interest and comfort, it was decided that her estate was one for life. In *Hoxie v. Finney*, 147 Mass. 616, the will gave the use and income with a right to use all, if deemed necessary for the widow's support and comfort, with the right to sell and dispose of the whole or any part, with a gift over of what remained. She was held to have an estate for life in the premises, with power to sell at her discretion. See also *Baker v. Thompson*, 162 Mass. 40, where the devise was to the wife, for her support and the support of a child, with the power to sell and dispose of the estate as she might deem best. Even under this language she did not take an estate in fee, but only an estate for life. *Ware v. Minot*, 202 Mass. 512. *Dorr v. Johnson*, 170 Mass. 540. *Dana v. Dana*, 185 Mass. 156.

In *Bassett v. Nickerson*, 184 Mass. 169, cited in the appellant's brief, "all the rest and residue of my estates" was given to Sarah A. K. Turner, with "full power to do with the remainder of my said estates as she may deem most proper during her natural life." There was no remainder over, but in a codicil there was bequeathed \$500, provided so much remained at the death of Sarah A. K. Turner, "and the payment of all her funeral and legal expenses are paid." In the second codicil the first codicil was cancelled and after certain legacies, a legacy of \$500 was given by the testator to his brother, subject to the same conditions stated in the first codicil. Sarah A. K. Turner took a fee in the real estate and absolute ownership in the personal property, the opinion stating that the power to dispose of the property during her life was merely an attempt to add something to that which was already complete.

In the case at bar the use and income is given to Mrs. Kemp. This use and income is given primarily for her support and comfort, but also for any other purpose she may deem necessary. There is a gift over. Her power of disposal is only in the event of the income being insufficient. Her power is limited to a sale and to a conveyance and transfer by deed or other instrument, for the purposes mentioned in the will. The case of *Martin v. Foskett*, 189 Mass. 368, was a case where a legacy of \$600 was given to a sister "for her use during her lifetime," with a gift over in trust. This court said the sister took an absolute interest in the \$600 and not merely the income during her life; she was to have possession and control of the fund, the limitation over was void as repugnant to the gift, citing *Bassett v. Nickerson*, *supra*.

Galligan v. McDonald, 200 Mass. 299, decides that where real property is devised to one and his heirs forever, a fee is granted. A limitation over on the death of the devisee is inconsistent with the grant, and void.

Burbank v. Sweeney, 161 Mass. 490, involved the right of a devisee to dispose of property by will where the estate was given for life to the devisee, with remainder over of portions to nephews and to charity, the residue to her, "to dispose of as she may deem expedient, but in the event that she should make no disposition of the same during her lifetime, I give the remainder of my estate not disposed of as above to my heirs at law." By the terms of the will the tenant had the power of disposal by will as well as by deed.

The appellant also relies on *Chase v. Chase*, 132 Mass. 473. It is plainly distinguishable from the case at bar. That case decides that, an unqualified gift of the use and income of personal property with no gift over vests an absolute interest in the donee. See *Bragg v. Litchfield*, 212 Mass. 148.

We find nothing in *Bullard v. Chandler*, 149 Mass. 532, to conflict with what is here stated.

Decree of the Probate Court affirmed.

So ordered.

CITY OF BOSTON, petitioner.

Suffolk. December 1, 1915. — February 14, 1916.

Present: RUGG, C. J., LORING, CROSBY, & CARROLL, JJ.

Equity Pleading and Practice, Appeal. *Practice, Civil*, Appeal. *Supreme Judicial Court*.

While there can be no appeal from a final decree or judgment entered substantially in accordance with a rescript of the full court of the Supreme Judicial Court and such an attempted appeal will be dismissed and the final decree or judgment will stand as if no appeal had been taken, if the form of the final decree or judgment ordered by the rescript is not embodied therein, examination of the subsequent record on appeal will be made in appropriate cases to ascertain whether it is in accordance with the rescript.

A decree, entered after the rescript stating the decision reported in *Boston, petitioner*, 221 Mass. 468, and which among other things apportioned to the cities of Chelsea and Revere a certain proportion of the cost of maintenance of Chelsea Bridge, as a whole, was correct, it not being intended by the rescript that the apportionment should be only of the north draw of the bridge. Such decree also was correct in apportioning the cost of maintenance of the whole of the Meridian Street Bridge instead of limiting the apportionment to the draw only of that bridge.

The decision in *Boston, petitioner*, 221 Mass. 468, that St. 1911, c. 581, as amended by St. 1913, c. 341, is constitutional, was affirmed.

The rescript which stated the decision reported in *Boston, petitioner*, 221 Mass. 468, accurately expressed the judgment of the court.

RUGG, C. J. This case was considered at large in 221 Mass. 468, and it was ordered that a final decree be entered apportioning the costs of the construction, repairs and maintenance of Chelsea Bridge and of Meridian Street Bridge between the cities of Boston, Chelsea and Revere in certain percentage in accordance with the report of a commission. Thereafter, a final decree was entered, from which appeals were claimed by the city of Chelsea and by the city of Revere.

There can be no appeal from a final decree or judgment entered substantially in accordance with a mandate or rescript of an appellate court. *Lincoln v. Eaton*, 132 Mass. 63, C9. *Nashua & Lowell Railroad v. Boston & Lowell Railroad*, 169 Mass. 157, 162. *Day v. Mills*, 213 Mass. 585, 587. *Commonwealth v. Phelps*, 210 Mass. 360. *Illinois v. Illinois Central Railroad*, 184 U. S. 77 and

cases cited at page 92, note. *United States v. Camou*, 184 U. S. 572. *United States v. New York Indians*, 173 U. S. 464. See *Williams v. Clarke*, 182 Mass. 316. Where the form of the final decree or judgment is not embodied in the rescript or mandate, in appropriate cases examination will be made on appeal of the subsequent record, in order to ascertain whether it is in accordance with the mandate or rescript. If the decree or judgment is in accordance with the rescript or mandate, ordinarily the appeal will be dismissed and the final decree or judgment will stand as if there had been no appeal.

In the case at bar, the form of the decree was not set out in the opinion or rescript. The substance of the rescript was in these words: "The report of the commissioners is confirmed except as to the cost of repairs and of maintenance of Chelsea Bridge: as to such repairs and such maintenance, the alternative finding whereby percentages are apportioned to the city of Chelsea and to the town of Revere is to be substituted and as thus modified the report is affirmed."

Necessarily the final decree is somewhat complicated. It is assailed in these particulars:

1. It is urged that the assessment to the cities of Chelsea and Revere should be confined to "the cost of maintenance of the north draw in Chelsea Bridge" and should not extend to "the cost of maintenance of the whole of Chelsea Bridge." The alternative award of the commissioners upon this point, which was affirmed by this court when the case was here before, is that "with respect to the cost of maintenance of said Chelsea Bridge we also think it just and equitable and apportion upon said city of Boston 60%
and we decide that the Town of Revere shall contribute 5%
and that the City of Chelsea shall contribute 35%

of the cost of maintenance of said bridge." 100%

These words express plainly an unmistakable purpose to apportion the maintenance of the bridge as a whole (with the exception of the south draw, elsewhere dealt with in the report), and not to restrict the apportionment to the maintenance of the north draw. Other parts of the report of the commissioners show that when the north draw was intended it was described in apt phrase.

In this respect the decree conforms to the rescript and to the terms of the award.

2. It is agreed by all parties that in paragraph 5 of the final decree the word "operation" shall be stricken out and the word "maintenance" inserted in its place. This apparently conforms to the report. By reason of the agreement, this substitution may be made.

3. The further contention that paragraph 7 of the decree should relate only to the draw in the Meridian Street Bridge and should not include the cost of maintenance of the entire bridge, finds no support in the record. The report of the commissioners apportions the "cost of maintenance of said bridge" as a whole, and contains nothing to indicate a purpose to limit the apportionment to the "draw."

4. The whole decree is assailed on the ground that it operates to deprive the cities of Chelsea and Revere of their property without due process of law, and denies them the equal protection of the laws. There is nothing in this point. *Stewart v. Kansas City*, 239 U. S. 14, 16. It was considered fully and decided adversely to the contentions of Chelsea and Revere in the earlier decision, and cannot be raised again at this stage.

5. A motion has been made to amend the rescript. It is based on the idea that the rescript does not express the judgment of the court as manifested by the opinion. This proposition is without foundation. The earlier opinion on this branch of the case simply decided which of two alternative findings of the commissioners was sound in law. It made no determination to the effect that the maintenance charges should be apportioned differently in any respect from that pointed out by the alternative finding of the commission which was held to be correct.

Let the order be *Motion to amend rescript denied.*

Paragraph 5 of decree amended by striking out from the last clause the word "operation" and by inserting in place thereof the word "maintenance," and as thus amended, the decree is affirmed.

J. P. Lyons, for the city of Boston.

L. R. Kiernan, (*A. A. Casassa* with him,) for the cities of Chelsea and Revere.

FRANK ALBRIGHT vs. CHARLES T. SHERER.

Worcester. October 5, 1915. — November 22, 1915.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Evidence, Competency, View. Negligence. Practice, Civil, View.

It is a settled rule that, in an action to enforce liability for a defendant's negligence in failing to keep appliances in proper repair and condition, evidence of subsequent acts in taking additional precautions to prevent other accidents is not admissible for the purpose of showing that such precautions were needed at the time of the accident.

In an action by a farm hand against his employer for personal injuries caused by the tipping over of a wagon of the defendant loaded with wood when the plaintiff had mounted the load and was attempting to start the horses, the plaintiff contended at the trial that the wagon was unsafe by reason of a defective king-pin, and the jury, in answer to special questions submitted to them by the judge, found that the condition of the king-pin was defective but that this condition was not a cause of the accident. The plaintiff asked the judge to submit the case for a general verdict, which the judge refused to do. The plaintiff excepted to this refusal, but did not object to the special questions submitted to the jury nor ask for the submission to them of any additional special questions. The judge ordered a verdict for the defendant, and the plaintiff alleged exceptions, contending that there was evidence for the jury of defects in the wagon that were not included in the questions framed which related to the condition of the king-pin. On an examination of the evidence reported in the bill of exceptions, it was held, that there was no evidence of a defect in the wagon other than one in the king-pin.

In the case stated above the jury took a view of the wagon, and the plaintiff contended that at the view defects might have been revealed to the jury which were not disclosed by the evidence in court and were not included in the special questions submitted to the jury, and therefore that the judge was not justified in ordering a verdict for the defendant. The bill of exceptions stated that it contained "all the material evidence in the case," and it contained no reference to any alleged defect in the wagon that was pointed out to the jury other than its condition "in respect to the king-pin." Held, that an assumption that other defects were disclosed by the view could not be made by way of conjecture in favor of an excepting party, who had failed to show that he was prejudiced by the action of the judge in ordering the verdict.

It long has been settled in this Commonwealth that a presiding judge in a case where the jury have taken a view may none the less on that account rule upon the effect of the evidence and order a verdict.

TORT for personal injuries to the plaintiff's right leg received on May 3, 1913, when the plaintiff was employed by the defendant as a general farm hand, by reason of being thrown from the top

of a load of cord wood in a wagon of the defendant that tipped over owing to an alleged defect in the wagon. Writ dated July 17, 1913.

In the Superior Court the case was tried before *Sanderson, J.* The facts shown by the evidence are stated in the opinion. The jury took a view of the wagon.

At the close of the arguments the judge stated that he had prepared certain questions which he would submit to the jury. The counsel for the plaintiff thereupon asked the judge to submit the case to the jury for a general verdict, which the judge refused to do.

At the close of his charge the judge submitted to the jury seven questions, explaining the purpose of each. These questions, with the answers of the jury, were as follows:

"1. Did any careless act of the plaintiff contribute as a cause to the tipping over of the load of wood?" The jury answered, "No."

"2. Did any careless act of Robert Frazell [the defendant's foreman] cause the load of wood to tip over?" The jury answered, "No."

"3. Was the king-pin a suitable and proper king-pin for the wagon on which the plaintiff was riding?" The jury answered, "Yes."

"4. Was the condition of the wagon in respect to the king-pin a defective or dangerous condition?" The jury answered, "Yes."

"5. Was the condition of the wagon, in respect to the king-pin, obvious to the plaintiff?" The jury answered, "No."

"6. Was the condition of the wagon in respect to the king-pin a cause of the accident?" The jury answered, "No."

"7. If the jury answer 'Yes' to question No. 6, — in what way the king-pin was the cause of the accident, — in what way was it the cause of the accident? If your answer to No. 6 was 'No,' you would have no occasion to answer No. 7." The jury returned no answer to this question.

Thereupon the judge directed a verdict for the defendant; and the plaintiff alleged exceptions.

D. W. Lincoln, (C. B. Rugg with him,) for the plaintiff.

G. A. Ham, R. H. Willard & W. H. Taylor, for the defendant, submitted a brief.

DE COURCY, J. The plaintiff, a general farm hand, employed by the defendant, was injured by being thrown from a wagon. After leaving the cart path he had driven the horses upon the rough and sloping wood lot, and he and the foreman, Frazell, had loaded on cord wood to the height of four feet. He had mounted the load, taken the reins in hand and was attempting to start the horses when the wagon tipped over and he went down with the load. The horses remained standing and the front wheels upright, but the hind part of the wagon separated from the front where the king-pin or king-bolt entered the head of the front axle.

The alleged negligence of the defendant was a failure to provide a safe and suitable wagon. The plaintiff contended that the king-bolt, connecting the body of the wagon with the front wheels, was too short by three fourths of an inch to reach the bottom of the hole in the front axle, and was not secured by a nut or key or chain. Apparently the trial judge understood from the course of the trial that this was the only defect relied on. At the close of the argument he stated that he had prepared certain questions which he would submit to the jury. These questions embraced the issues of the plaintiff's due care, the negligence of the defendant and the care of the fellow servant, Frazell. It seems manifest from the charge that they were designed to "ascertain so far as is practicable all the facts . . . as to liability . . . necessary on any theory of the law to enable the court to make the proper final disposition of the case" under St. 1913, c. 716, § 2. See *Lodge v. Swampscott*, 216 Mass. 260, 263. The counsel for the plaintiff made no objection to the form of the proposed questions, and did not ask that any additional ones should be framed, embracing other issues of fact. He did ask the judge to submit the case to the jury for a general verdict; but took no exception to the refusal to do so.

The jury answered that the condition of the wagon in respect to the king-pin was defective or dangerous, but that this condition was not a cause of the accident. Thereupon the court directed a verdict for the defendant, to which the plaintiff duly excepted.

It is argued by the plaintiff that there was evidence for the jury of defects in the wagon that were not included in the questions framed. Although there is grave doubt as to whether this contention is now open to him, in view of the conduct of the trial, we prefer to assume that he has not waived it.

Two particulars are relied on. The first is the testimony of the defendant that "since the accident he had a piece of iron put on the side and top of the wagon as he recollected so that it would carry a load without sagging." It is settled that subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence for the purpose of showing that such precautions were needed at the time of the accident. *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168. *Silva v. Davis*, 191 Mass. 47. Further, this testimony must be considered in connection with what the defendant said immediately after that quoted, namely, that the wagon "was repaired the month before the accident and a new body put on." There was no evidence that the wagon sagged before the accident. On the contrary all of the testimony was in accord with that of the plaintiff's own expert, who said that "as far as the wheels, axles, body, poles and strength of the wagon are concerned, he believed the wagon was perfect."

The main contention of the plaintiff is that the view of the wagon taken by the jury may have revealed defects other than those embraced in the questions as framed, and not disclosed in the evidence in court; and that for this reason the judge was not warranted in directing the verdict.

It is to be noted that the question before us is not whether, or to what extent, the impressions received by the jury when viewing the wagon are to be considered as evidence in the case. The narrower question presented here is, has the plaintiff, as excepting party, shown that he was prejudiced by the action of the judge. Manifestly this must be determined by what appears in the record before us, which purports to contain "all the material evidence in the case." If any alleged defect in the wagon, other than its condition "in respect to the king-pin" was pointed out to the jury, the plaintiff had a right to have the fact incorporated in the bill of exceptions. *McMahon v. Lynn & Boston Railroad*, 191 Mass. 295. It is necessary to have it appear of record in order that this court may determine whether there was anything in the case, to be derived either from the testimony or from the view of the wagon, which entitled the plaintiff to go to the jury on any issue not embodied in the questions submitted to them. *McCarty v. Fitchburg Railroad*, 154 Mass. 17, 20; and adapting what was

said by Knowlton, C. J., in *Williams v. Citizens' Electric Street Railway*, 184 Mass. 437, "We cannot assume in favor of the excepting party that the inspection of the [wagon] by the jury added anything to the evidence stated in the bill of exceptions." We find no basis in the record for a contention that the view disclosed any defect in the wagon other than what was covered by the questions as framed. It is mere conjecture to say that the view may have revealed some other defects.

It long has been settled in this Commonwealth that the trial judge properly may rule upon the effect of the evidence, and direct a verdict, notwithstanding the fact that the jury has taken a view. *Rigg v. Boston, Revere Beach, & Lynn Railroad*, 158 Mass. 309. It may become his duty, when the testimony discloses what occurred at the view, to instruct the jury to disregard certain facts which they observed, as not being within the scope of the view they were directed to take, or as irrelevant to the issues in the case. Unless facts relied on in connection with the view are embodied in the record, a litigant may be unable to bring before this court all the evidence on which the jury based their verdict, and thereby may be denied an opportunity for the correction of error committed in the trial court.

In the present case, as the plaintiff's exceptions do not disclose any evidence of defects in the wagon other than those embraced in the questions to the jury, he fails to show that he was prejudiced by the action of the judge in directing a verdict. See *Fitchburg Railroad v. Eastern Railroad*, 6 Allen, 98; *Tully v. Fitchburg Railroad*, 134 Mass. 499.

Exceptions overruled.

EZRA A. STEVENS vs. STEWART-WARNER SPEEDOMETER CORPORATION.

Suffolk. November 18, 1915. — January 10, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of bailee for hire. *Bailment*, Duty of bailee for hire. *Subrogation*. *Practice, Civil*, New trial. *Evidence*, Cross-examination to show bias. *Witness*, Cross-examination.

In an action against a speedometer maker for damage to the plaintiff's automobile caused by the defendant negligently permitting it to be stolen when it had been entrusted to him to have its speedometer repaired, there was evidence that the defendant occupied for his business the first floor of a building which he used as a store and office and a basement under it which he used as a repair shop and that this basement opened upon an alleyway back of the building, that speedometers attached to cars from day to day were repaired by the defendant in the alleyway, that the plaintiff left his car in the alleyway to have the speedometer repaired with the acquiescence of a man who ordinarily looked after the cars for the defendant and who agreed to have the plaintiff's car ready for him when he returned, and that when the plaintiff returned he found that his car had been stolen. Later the automobile was found abandoned in a badly damaged condition. *Held*, that the plaintiff was entitled to go to the jury, as it could be found on the evidence that the defendant had accepted the custody of the car as a bailee for hire and was bound to exercise due care for its safety and protection.

In the case stated above, it further appeared that an insurance company had paid to the plaintiff the amount of the loss he had sustained by reason of the theft of his car, and it was *held*, that the insurance company was subrogated to the rights of the plaintiff against the defendant and was entitled to maintain the action in the plaintiff's name.

In the same case a witness, who had seen the automobile after it had been recovered in its damaged condition, testified for the plaintiff that its value then was about \$100. The defendant's counsel on cross-examination asked this witness for whom he was working, and stated that he expected the answer to be that he was working for the insurance company for whose benefit the action was brought. He also asked the witness whether he was acting for the insurance agents representing that insurance company, and stated that he expected an answer in the affirmative. The judge excluded the questions. *Held*, that the questions were competent as calling for evidence tending to show bias on the part of the witness, and that exceptions to their exclusion must be sustained.

In the same case this court, in sustaining exceptions relating only to the question of the amount of damages and finding no error in the trial of the issues relating to the defendant's liability, ordered that the new trial should be limited to the issue of damages.

CROSBY, J. This is an action for damages to an automobile caused by the alleged negligence of the defendant. The declaration is in three counts, the first two being in tort and the third in contract. The defendant was engaged in the manufacture and sale of speedometers and had a place of business on Columbus Avenue in Boston, which consisted of the first floor and basement of a building fronting on that avenue. The first floor it used as a store and office, and the basement it used as a repair shop. The basement at the rear opened on an alleyway which extended along the rear of various buildings that fronted on Columbus Avenue.

The plaintiff introduced evidence tending to show that on July 22, 1913, he took his automobile to the defendant's place of business, found the man in charge and called his attention to the speedometer and to the fact that it was not working properly; that the man asked the plaintiff whether he was going to leave the automobile, and that the plaintiff said he was; that afterwards he returned and found a ticket on the car and went upstairs to the office and paid for the repairs and took the car away. The plaintiff testified that two days later he returned with his car into the alley and told a man whom he had seen about the defendant's premises two days before, that the speedometer was still out of order, "that the man looked at it and said, 'Are you going to leave it?' that the plaintiff said, 'Yes, I am going to leave it, and I will be back at half past one;' that the man said, 'All right, I will have it ready.'" The plaintiff testified that he took the switch key out of the car so that no one would be able to run it and went away and returned about half past one o'clock and found that the car was not in the alley. He further testified "that the man said, 'Ordinarily I look after the cars but to-day I had to go to the dentist's.'" There was evidence to show that speedometers attached to cars from day to day were repaired in the alley by the defendant.

The defendant introduced evidence tending to show that its employees were instructed that all cars were left in the alley at the owner's risk and that such was a rule of the defendant. About a month after the automobile was left in the alley it was found in a badly damaged condition. The jury found for the plaintiff and assessed damages in the sum of \$200.

We are of opinion that it could not have been ruled that the

plaintiff could not recover.* There was evidence from which it could have been found that the automobile was left in the custody of the defendant, and, if the jury so found, the defendant was liable as a bailee for hire and as such it was required to exercise due care to protect the bailment from being lost or damaged; that is, the defendant as such bailee in the performance of its duty was required to exercise the care of a reasonable man under the circumstances. *Cass v. Boston & Lowell Railroad*, 14 Allen, 448. *Hecht v. Boston Wharf Co.* 220 Mass. 397, 403. The liability of the defendant as a bailee for hire is not affected by reason of the knowledge of the owner as to the manner in which, or the place where, the property was kept. Its acceptance by the defendant imposed upon it due care for its safety and protection. *Hecht v. Boston Wharf Co. supra*.

The evidence warranted a finding that the defendant assumed custody and control of the car and thereafter allowed it to remain in the alley without using any precautions whatever to protect it from being stolen. It could have been found that the theft of the car was the natural and probable result of the negligence of the defendant. *Murray v. International Steamship Co.* 170 Mass. 166. *Willett v. Rich*, 142 Mass. 356. *Lane v. Atlantic Works*, 111 Mass. 136.

If the Federal Insurance Company has paid the plaintiff for the loss which he had sustained by reason of the theft of the car, it was subrogated to the rights of the plaintiff and is entitled to maintain this action against the defendant in the name of the plaintiff if the jury were satisfied that the car was left in the defendant's custody and was damaged by reason of its negligence. *Hart v. Western Railroad*, 13 Met. 99. *Wall v. Mason*, 102 Mass. 313, 316. *Clark v. Wilson*, 103 Mass. 219. *Jackson Co. v. Boylston Mutual Ins. Co.* 139 Mass. 508. *McCauley v. Norcross*, 155 Mass. 584. *Koplan v. Boston Gas Light Co.* 177 Mass. 15, 27. *Murray v. Boston Ice Co.* 180 Mass. 165. *Cambridge v. Hanscom*, 186 Mass. 54. *Horan v. Watertown*, 217 Mass. 185, 186.

The plaintiff called as a witness one Adams who testified that he saw the automobile after it had been recovered and while it was in a damaged condition, and that its value then was about

* The defendant's request to make this ruling was refused by Fox, J., before whom the case was tried.

\$100. On cross-examination he was asked, "Who were you working for?" This question was excluded and the defendant excepted. The defendant's counsel stated that he expected the answer would be "The Federal Insurance Company who insured the car against theft." On cross-examination this witness also was asked by the defendant's counsel, in substance, whether he was acting for Hinckley and Woods, insurance agents, when he sold the car. This question was excluded and the defendant excepted. The counsel for the defendant stated that he expected the answer would be "Hinckley and Woods, agents for the Federal Insurance Company."

We are of opinion that these questions were competent as bearing upon the weight to be given to the testimony of the witness upon his direct examination. If he was in the employ of the insurance company for whose benefit this action was brought, such evidence might have a tendency to show bias and should have been admitted.

We are of opinion that because of the exclusion of this evidence the exceptions must be sustained. We do not find any other error in the admission or exclusion of evidence or in the refusal to give the instructions requested by the defendant. The charge correctly presented the issues to the jury and the exceptions to it cannot be sustained. Let the entry be

Exceptions sustained.

New trial limited to damages.

S. D. Elmore, for the defendant.

R. Homans, (*A. G. Grant* with him,) for the plaintiff.

WILLIAM B. ARNOLD vs. GEORGE H. MAXWELL & another.

Suffolk. November 8, 9, 1915. — January 17, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Partnership. Corporation. Equity Jurisdiction, Accounting between partners.

The relations of partners as between themselves are not changed by the adoption of the instrumentality and name of a corporation in carrying on their business. It is the duty of a partner to disclose to his copartner any bargains affecting their

joint interest entered into by him with third parties for his own benefit and all matters of business within the scope of the partnership agreement of which his copartner is ignorant and has not the means of information.

Where upon a settlement between two partners, one a business man who had had "charge of the business management" and the other a lawyer who had agreed to "manage the legal end of the enterprise and advise with" his partner, "both parties working without remuneration" and having agreed to "share equally in all respects, both as to ownership, profits and expenses," the lawyer partner had "purposely refrained" from bringing to the business partner's attention certain charges for legal services which he had been paid, and also had failed to inform his partner of his acquisition of certain additional shares in a corporation that they had formed for carrying on the partnership business that he had acquired without his partner's knowledge and on which he had received dividends, it was *held*, that the business partner, who first received information in regard to these matters four years after the settlement, might maintain a bill in equity against the lawyer partner for an accounting.

In the suit in equity named above, where it appeared that, owing to the settlement having been fully executed and the subsequent lapse of time, the parties could not be restored to the position they were in when the settlement was made, it was *held*, that the defendant was chargeable in a partnership accounting on the basis of the agreement of equality as of the date of the settlement both for the payments made to him for legal services and for the value of the additional shares of stock secretly acquired by him.

BRALEY, J. The defendant Maxwell, to whom we shall hereafter refer as the defendant, having waived his exceptions to the master's report and his appeal from the order of the single justice * declining to recommit, the question for decision is whether upon the master's findings the bill can be maintained.

"It is an elementary rule of equity pleading, that the bill must contain a clear and exact statement of all the material facts upon which the plaintiff's right to the relief sought depends, and that he can only introduce evidence of such facts as are thus stated." *Drew v. Beard*, 107 Mass. 64, 73. The bill plainly violates this rule. It is so enswathed in verbiage that it is difficult to ascertain precisely the grounds on which rescission of the final settlement, and the setting aside of the release which the plaintiff gave the defendant, is asked. But, as the defendant did not except to the master's report, the master's interpretation and generalization may be adopted, that in violation of an agreement between them the defendant formed and executed a plan to acquire control of the enterprise, and to "force out the plaintiff," and that the final

* *Braley, J.*, who at the request of the parties reserved the case for determination by the full court.

settlement was the consummation of the plan; that fiduciary relations existed between them, and that the defendant violated the duties imposed by these relations by certain acts, as well as by his failure to disclose certain acts, and that either the settlement as a whole or at least in part was induced by this breach of duty. Or more briefly, the plaintiff's alleged cause of action arises from non-disclosure where the duty of disclosure as to the transactions impeached rested on the defendant. We pass over their previous acquaintance and negotiations which culminated in the agreement under seal of June 30, 1905, referred to by the master and counsel as the "equality agreement." In substance this provides, that the parties "have agreed and do hereby agree that in the Filler Business, * upon which we are about to enter, and in all matters which now and hereafter may be connected therewith, we shall share equally in all respects, both as to ownership, profits and expenses; and, as soon as it shall be expedient, the said Maxwell shall organize the North American Chemical Company to take over said business. Said Maxwell shall manage the legal end of the enterprise and advise with the said Arnold as to business management, and the said Arnold shall have charge of the business management, both parties working without remuneration." The agreement undoubtedly created a partnership and stated the basis on which they should participate and hold stock in the corporation subsequently organized "to take over said business," and to which the assets were transferred, but at what date is not specifically shown. It is immaterial as between themselves whether they conducted the business under a firm name, or adopted the instrumentality and name of a corporation. The parties acted upon this understanding of mutual interest and ownership, for each finally received of the capital stock four hundred and fifty shares while the balance remained in the treasury. *McMurtrie v. Guiler*, 183 Mass. 451. *Ginn v. Almy*, 212 Mass. 486. *Crompton v. Williams*, 216 Mass. 184, 186, 187. *C. H. Batchelder, Inc. v. Batchelder*, 220 Mass. 42.

The duty accordingly devolved on each to disclose to the other any bargains affecting their joint interest entered into with third parties for his own benefit, or any matters of business within the

* The making of a filler used in the manufacture of shoes to fill the space between the inner sole and the outer sole.

scope of the agreement and mutual understanding, of which the other, not having means of information, was ignorant. *Drew v. Beard*, 107 Mass. 64, 72, 73. *Jones v. Dexter*, 130 Mass. 380, 383. *Moore v. Rawson*, 185 Mass. 264, 274. *Hawkes v. Lackey*, 207 Mass. 424, 432, 433. The enterprise after some experimentation proved very successful financially, but the master finds that the business relations of the partners were never wholly harmonious. The plaintiff was a man of good ability and of much business experience, while the defendant was a member of the bar whose professional practice had been very largely that of a trademark and patent solicitor. It was because of his employment by the inventor of the filler that he became interested and urged the plaintiff to join with him in acquiring the patent and entering upon its manufacture. The master, after recapitulating the substance of the material evidence, finds in his conclusions: that the defendant shortly after the enterprise began to develop conceived the purpose of getting control of the corporation and the business, although he did not at any time design to cheat the plaintiff, who during all the transactions to which reference will be made was a director and apparently vice president. The strain and friction did not lessen for reasons fully detailed by the master, and finally in something like three years after the agreement the parties entered into negotiations which led to a sale by the defendant to the plaintiff of his capital stock and of all interest in the assets of the company, after the plaintiff had been informed by the defendant that he owned nine hundred and seventy-four shares which would be transferred. But, the terms having been settled and the agreement substantially performed, the plaintiff consulted counsel, and acting upon their advice induced the defendant to rescind, when the defendant bought out the plaintiff on the same terms, and the final agreement and release were executed and delivered.

It was not until four years thereafter and upon information furnished by one Spalding, whose relations to the parties will be referred to later, that the plaintiff brought the present suit. The master's analysis of the material transactions are "the additional issue of stock," "the alleged manipulation of dividends," "the Thoma stock," "the Spalding transaction," and the defendant's "charges for services as patent solicitor." We are satisfied from the tenor and effect of the entire report, that in their consideration

the books of account, the stock ledger and the corporation records as between the parties should stand on the same footing as partnership books, to which the plaintiff never was denied access.

The directors having voted that the stockholders be permitted to purchase treasury stock at par to the extent of one share for every four and one half of their respective holdings, the defendant took his apportionment, but the plaintiff did not choose to exercise the option. Under these circumstances the plaintiff cannot rightly insist that the defendant violated the agreement. It also is shown that the sixty-nine shares issued to Thoma were subsequently surrendered, and no part ever passed to the defendant's ownership. The plaintiff as a director having participated in the vote, he must be held to have known that by the payment of dividends as voted the amount received on the defendant's stock and the Spalding stock as shown by the stock ledger would be sufficient to pay for the allotment of treasury stock on all of these shares. It is now necessary before discussing the transactions embraced within the master's phrase "Spalding stock" to recur fully to the plaintiff's position at the date of settlement.

The first settlement having been rescinded, the parties were free to negotiate as if it had not been made. The plaintiff in the first settlement acted for himself, but in making the final agreement and giving the release he acted under the advice of competent counsel. The master's findings as to the extent of his knowledge and means of knowledge are important. The plaintiff knew from what the defendant had told him that the latter had acquired nine hundred and seventy-four shares, although the plaintiff always had claimed that the equality agreement controlled between them except as modified by the agreements to issue stock to Spalding and Thoma. He also knew that the shares included the Spalding stock and that the defendant paid a salary to Spalding. The plaintiff's faith in the defendant's integrity had begun to wane, and the parties mutually regarded the settlement "as one, not of mathematics or of bookkeeping, but of trading." While the original agreement had been called to the attention of counsel, who was doubtful as to its scope and effect after the formation of the corporation, no further inquiries were made. A lump sum or valuation was offered and accepted without any investigation of the assets; their business relations were closed, and the plain-

tiff "fully comprehended the nature of the instruments which he signed, including the release." It is manifest from this part of the report that the plaintiff and his counsel were content to make the best of what they considered an unsatisfactory bargain. If the plaintiff is treated as a vendor or as a purchaser, the duty of disclosure resting on the defendant did not embrace under the conditions shown the transactions discussed, and no ground for rescission appears. *Topliff v. Jackson*, 12 Gray, 565, 569. *Law v. Law*, [1905] 1 Ch. 140.

But the defendant's manipulation of the Spalding stock and his charges for legal services stand differently. Where a fiduciary relation is established, means of information or constructive notice is not the equivalent of actual knowledge. The assent of the plaintiff, even if he was desirous of withdrawing from all further association with the defendant on the best offer he could get, did not comprise transactions solely in the defendant's private interest of which he was ignorant. If he is to be bound, his assent must rest on his standing by with knowledge of his rights without making any protest. *Manheim v. Woods*, 213 Mass. 537, 543, 544. *Hayes v. Hall*, 188 Mass. 510. *Freeman v. Freeman*, 136 Mass. 260, 263. *Lacey v. Hill*, 4 Ch. D. 537, 547, 548. The master reports concerning the agreement entered into by the defendant and the plaintiff with Spalding, that while the plaintiff was induced to believe that Spalding was to be employed by the corporation and paid in stock to the extent of one hundred and twenty-five shares from each of their holdings, or the equivalent in treasury stock, the defendant purposed through the arrangement to advance his plan for obtaining corporate control. It is found that Spalding became the confidential employee of the defendant, and that, as neither wished to decrease his holdings, treasury stock, amounting to three hundred and forty-six shares, while issued in his name was immediately transferred by indorsement of the certificate to the defendant, who at all times was the actual owner, and received the dividends. It is further found that under the vote to issue treasury stock, the proportional part amounting to seventy-seven shares to which Spalding appeared to be entitled, although issued in the name of the defendant's father, was in fact paid for and controlled or owned by the defendant. It is obvious that neither the defendant's statement as to his ownership

of stock nor the plaintiff's knowledge that Spalding's salary was paid by the defendant nor an examination of the stock ledger would have acquainted the plaintiff with what the defendant had done for his own secret pecuniary advantage.

The agreement having remained operative after incorporation, as we have said, the defendant had undertaken, and the master reports, that the plaintiff understood that he had undertaken to look after the "legal end of the enterprise" while the plaintiff had "charge of the business management," each working without remuneration. It appears that while the corporation paid all charges for legal services rendered before as well as after its formation, none of the charges appeared on the books except that the stubs of the check books would have shown the later but not the preliminary payments. If it were not for the master's finding that the defendant, being in doubt as to the true construction of the agreement, "purposely refrained from bringing these charges" to the plaintiff's attention, coupled with the finding that the payments were made under his personal supervision and direction, we should hesitate to exclude them from the settlement. The defendant's gains, however, from this source were in violation of the agreement, as well as the appropriation of stock, and the plaintiff when making the settlement parted unknowingly with property of much value, and the master unhesitatingly states that the defendant knew of his ignorance but remained silent. *Maddeford v. Austwick*, 1 Sim. 89, affirmed in 2 Myl. & K. 279.

What should be the measure of relief? The consideration the plaintiff received was not paid in money, but consisted partly of "notes, cash and preferred stock" of a foreign corporation, and upon a valuation of \$300 the plaintiff also was "to take over the elevator, pulleys, shafting, and belting at the factory" of the company. The settlement having been fully executed, it is reasonably certain from the lapse of time and the nature of a substantial part of the consideration, that the parties cannot be restored to the position they were in when the settlement was consummated. *Brown v. Hartford Fire Ins. Co.* 117 Mass. 479. But the plaintiff notwithstanding his inability to rescind can recover money damages. *Coolidge v. Brigham*, 1 Met. 547, 553. *United Zinc Companies v. Harwood*, 216 Mass. 474, 477, 478, and cases cited. The defendant consequently is chargeable,

in a partnership accounting on the basis of the agreement of equality and as of the date of the settlement, with the value of the Spalding stock, and the apportionment of treasury stock to which this stock was entitled, and which was actually issued, with all dividends received thereon, less any payment on account of treasury stock made to the company, and also with the payments for legal services, with interest on the whole amount from the date of settlement to the date of filing the bill.

As to the defendant company the bill is to be dismissed. *Pratt v. Tuttle*, 136 Mass. 233, 234.

The case is to be recommitted to the master, but the terms of the decree are to be settled before a single justice.

Ordered accordingly.

J. B. Studley, for the plaintiff.

S. L. Whipple, (*A. Lincoln* with him,) for the defendants.

MARY MURPHY vs. MORRIS COHEN, administrator.

Suffolk. November 9, 1915. — February 29, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Of one controlling real estate.

A woman real estate agent, who, in attempting to show to a prospective tenant, with the permission of the owner, the cellar of a house that she never has entered before, opens the door to the cellar and notices that it is not very light there and sees the stairs which look to her broader than they are, and, without waiting to know more, starts to go down the stairs and, stepping by the side of the first step beyond the edge of it, is "pitched head first right down into the cellar," has suffered injury by reason of her own carelessness and cannot maintain an action against the owner of the building, who was under no obligation to warn her of the obvious danger of descending an unfamiliar flight of stairs, so dimly lighted that the width of the treads could not be seen plainly, without taking any precaution to ascertain the safety of her footing.

TORT for personal injuries sustained by the plaintiff on November 30, 1912, from falling down the cellar stairs of an apartment house owned and controlled by the defendant on Crescent Avenue in the part of Boston called Brighton. Writ dated February 13, 1913.

In the Superior Court the case was tried before *White, J.* At the close of the evidence, which is described in the opinion, the judge ruled that upon all the evidence the plaintiff was not entitled to recover and ordered a verdict for the defendant. By agreement of the parties the judge reported the case for determination by this court, with the stipulation that, if the ruling and the ordering of the verdict were right, judgment should be entered for the defendant on the verdict; and that, if the case ought to have been submitted to the jury, judgment should be entered for the plaintiff in the sum of \$1,200.

The case was submitted on briefs.

H. A. Carney, for the plaintiff.

J. Ingram, for the defendant.

BRALEY, J. The defendant having introduced no evidence, the jury on the plaintiff's testimony would have been warranted in finding that, being engaged "in the real estate business," she "had a prospective tenant who wanted a six room apartment," and, having been informed that the defendant's intestate had the number of rooms required, she asked by telephone for permission to let the vacant apartment. The decedent replied that her husband "had charge of the house and referred me [the plaintiff] to him." A conversation with the husband resulted in his giving the plaintiff permission to rent at a special price, as well as handing to her the keys of the house. We hereafter shall refer to the "prospective tenant" as the tenant.

The plaintiff, accompanied by the tenant, thereupon visited the premises where the apartment was inspected. After expressing satisfaction with the rooms the tenant before deciding to rent asked to see the cellar "that went with the apartment," and they went down the back stairs to the main landing and small hallway to the cellar door. What followed she described as follows: "I opened the cellar door and looked down the stairs as best I could. It was not very light there but I could see the stairs and they appeared broader to me than they turned out to be. I stepped down with my right foot, on the right side of the first step, in the natural way. . . . There was nothing for my toes to rest upon and I was pitched head first right down into the cellar. I threw up my arms to grasp for the railing, but there was nothing there for me to take hold of, but the both sides of the wall. . . . It was not very light in the hall.

. . . I didn't stand very long at the top of the cellar stairs, I was anxious to get through, I looked and started down the stairs."

The stairway, on her testimony, was not a pitfall nor out of repair. If it be assumed that the plaintiff was on the premises at the invitation of the defendant's intestate, who could be found to have known that the apartment which included the cellar would be inspected by the plaintiff and the tenant, there was no duty on his part to warn her of the obvious danger of descending an unfamiliar flight of stairs so dimly lighted that the width of the treads was scarcely visible, without taking the slightest precaution to ascertain the certainty and safety of her footing. *Lord v. Sherer Dry Goods Co.* 205 Mass. 1, 2, 3.

The accident having been due to the plaintiff's carelessness and not to the breach of any legal duty owed by the intestate, judgment for the defendant on the verdict is to be entered as provided by the terms of the report.

So ordered.

GEORGE C. VON ETTE'S (dependent's) CASE.

Suffolk. November 16, 1915. — February 29, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act.

If a compositor in the employ of a newspaper corporation, who works at night on the sixth floor of his employer's building in a room that is ill-ventilated and is very hot in summer, on a hot summer night, following a practice that prevails among the compositors working in the room, in order to get away from the heat and get into the fresh air descends a fire escape stairway to the roof of an adjoining building belonging to his employer and falls off a part of the roof twenty-three feet away from the stairway where there is no railing, and is killed, his death can be found to have resulted from an injury that arose out of and in the course of his employment within the meaning of St. 1911, c. 751, Part II, §§ 1, 6.

In the case stated above there was no direct evidence of suicide or that the deceased workman was under the influence of liquor. It appeared that when he left home to go to work that night he told his wife that he would be at home at two o'clock the next morning, that he was of a cheerful disposition and apparently in good health, contented and happy, that he had made an appointment to go

the next day with a fellow workman to visit a certain place of interest and had made arrangements to attend an evening recital to be given by his sister, that he last was seen alive at about eleven o'clock at night and that his dead body was found the next morning at a quarter before four o'clock upon the ground six stories below the floor on which he worked and under the part of the roof that had no railing. *Held*, that a finding was warranted that the employee did not commit suicide, that he was not under the influence of liquor and that his death was accidental.

In the case stated above it appeared that one of the rules of the employer, which was posted on the premises, was as follows: "No employee shall leave the composing room during working hours, except on office business, without permission of the man in charge," but it was found by the Industrial Accident Board that there was an established custom among the employees, which was known to the employer, to go upon the roof for the purpose of obtaining fresh air, and that going upon the roof was an incident of the employment of the deceased employee. *Held*, that the board were warranted in finding that the rule was not in force at the time of the accident, and also that the act of the deceased in going on the roof on a hot night was incidental to his employment.

CROSBY, J. This is an appeal from a decree entered in the Superior Court * under the workmen's compensation act. The facts as disclosed by the evidence are briefly as follows:

George C. Von Ette, the deceased, was in the employ of the Globe Newspaper Company, in Boston, as a compositor. He met his death on the night of June 21, 1914. He went to work on the evening of June 21, and his employment for that night would have been finished at a quarter before two o'clock the next morning. He was last seen alive about eleven o'clock. His dead body was found the next morning at a quarter before four o'clock upon the ground six stories below the floor where he worked. The injuries which caused his death resulted from falling from the roof of the building adjoining the room in which he worked. When the deceased left his home to go to work that night, he told his wife that he would be at home on the two o'clock car the next morning. He was apparently in good health; he was cheerful in disposition, and there was no evidence tending to show any trouble between him and his wife. He was apparently contented and happy. He made an appointment with one of his fellow workers to visit the new fish pier on the next day. He also made arrangements to attend a recital on the following Monday evening to be given by his sister. It was a common practice of the workmen employed in the room with the deceased to go upon the roof of a building on the employer's

* By order of *Morton, J.*

premises for the purpose of getting fresh air, the composers' room where the men worked being very warm, in the summer time, the temperature sometimes being one hundred and ten degrees, and warmer than the temperature outside.

The arbitration committee found "that on the morning of June 22, the employee went from the room in which he was working, to the roof, it being a hot night and he being in need of fresh air; and while on the roof he accidentally slipped and fell to the ground below where he met his death. . . . From the roof to the roof below there is a stairway of iron, as used in ordinary fire escapes." There was an iron railing which extended along the edge of a part of the roof, but there was no railing on that side of the roof at the place above where the body of the deceased was found.

The committee further finds "that on the night the employee met with the injury, following the custom which had prevailed in the establishment, he went upon the roof; that it was a hot night; that the ventilation in the room where he worked was poor and he went out to get the fresh air; that the building adjoining on the roof of which the employee went was the property of the employer. There is no evidence in the case pointing to any other reason for his going upon the roof except . . . to get away from the heat and get into the fresh air, and we further find that in so doing he was within the scope of his employment and that the injury arose out of and in the course of his employment."

The Industrial Accident Board took two views of the premises, one in the daytime and the other at night, and made a decision based upon their observations taken at the views, upon the evidence heard and reported by the arbitration committee, and upon other evidence presented at the hearing on review. The record contains all of the evidence presented to the committee and to the board.

One of the office rules of the employer posted on the premises was as follows: "No employee shall leave the composing room during working hours, except on office business, without permission of the man in charge." The board finds that there was an established custom among the employees, known to the employer, to go upon the roof for the purpose of obtaining fresh air, and that it was an incident of the employment of the deceased to go upon the roof. The board also finds as follows: "That sometime toward midnight of

June 21, or early in the morning of June 22, the employee went from the room in which he was working, the room being hot and the work being slack, to the roof of the Devonshire Street building, which is part of the Globe premises, he being in need of fresh air, and it being customary to use this roof for that purpose, and that while on this roof he accidentally walked over the edge, or became dizzy and slipped off, into the areaway and fell to his death. We find that in going upon said roof he was acting within the scope of his employment and that his death was the result of injuries arising out of and in the course of his employment. We find that he did not commit suicide and that he was not under the influence of liquor."

The insurer contended that the findings made by the committee and by the board were not warranted, and requested the board to rule that, as matter of law, no compensation could be awarded. Whether this ruling should have been given depends upon the questions: (1) Did the deceased voluntarily take his own life or was his death the result of a condition of intoxication or was it due to his accidentally falling from the roof? (2) If the injury and death resulting therefrom were due to an accident, did the injury arise out of and in the course of the employment of the deceased?

If the deceased met with his injury by reason of his serious and wilful misconduct, no compensation can be awarded, and it may be conceded that, if he voluntarily took his life or if his fall from the roof was due to a condition of intoxication, the ruling requested should have been given. It has been held repeatedly that in cases arising under the act, in order that an award of compensation may be made, the burden of proof rests upon the claimant to show by a preponderance of the evidence that an injury occurred and that it arose out of and in the course of the employment. The determination of these issues cannot be left to speculation, surmise or conjecture. If the evidence upon the questions involved is slender but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant. A finding of the Industrial Accident Board is not to be set aside if warranted by the evidence although we might feel that a different conclusion would have been reached by us if we had been called upon to decide the question in the first instance. If this claimant were required to prove all the facts and circumstances attending her husband's death by direct evidence,

it is plain that her claim would fail, but she is not limited to such proof. She may show the existence of such facts as would warrant the inference that her husband did not commit suicide and did not meet with his death as the result of intoxication. *Commonwealth v. Doherty*, 137 Mass. 245. *Commonwealth v. Kennedy*, 170 Mass. 18, 25. *Colburn v. Spencer*, 177 Mass. 473. *Bigwood v. Boston & Northern Street Railway*, 209 Mass. 345. *Sponatski's Case*, 220 Mass. 526. There was no evidence of suicide, and therefore the presumption against the commission of a crime is enough to support the finding on that point. *Commonwealth v. Mink*, 123 Mass. 422. *Sponatski's Case*, 220 Mass. 526. *Furnivall v. Johnson's Iron & Steel Co. Ltd.* 5 B. W. C. C. 43. There was no evidence to show that he was under the influence of liquor. The board having found that the employee did not commit suicide and was not under the influence of liquor, and no other cause of death having been suggested except that he accidentally fell off the roof, we cannot say that the finding of the board that his death was accidental was not warranted.

The insurer further contends that the evidence does not warrant a finding that the employee's death arose out of and in the course of his employment. If we assume that it would be a violation of the rule to go upon the roof during working hours without seeking permission for the purpose of obtaining fresh air, the question is whether the rule was in force at the date of Von Ette's death, or whether it had been waived by the employer. There was ample evidence of a general practice of the men who worked in the composing room to go upon the roof to get fresh air and cool off on hot nights and that such practice was known to the employer. We are of opinion that the board were warranted in finding that the rule was not in force but had become a dead letter at the time of the accident. *McNee v. Coburn Trolley Track Co.* 170 Mass. 283. *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 98. *Brady v. New York, New Haven, & Hartford Railroad*, 184 Mass. 225. *Cutts v. Boston Elevated Railway*, 202 Mass. 450, 456. *Crowley v. A. O. H. Widows' & Orphans' Fund*, 222 Mass. 228.

The question whether the injury arose out of and in the course of the employment is one of some difficulty. A majority of the court are unable to say that the finding of the board was wrong. The acci-

dent happened upon the premises of the employer and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside his employment, but could have been found to be incidental thereto. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time. *Sundine's Case*, 218 Mass. 1. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93. *Blowell v. Sawyer*, [1904] 1 K. B. 271. *Moore v. Manchester Liners, Ltd.* 3 B. W. C. C. 527.

The fact that the unprotected place upon the roof where it is found the deceased fell off is twenty-three feet away from the foot of the stairway is not decisive against the claimant. He could have been found to be rightfully upon the roof and was not bound to remain at the foot of the stairs or on any particular part of the roof. We cannot say as matter of law that the board was not warranted in finding that the injury arose out of and in the course of the employment even if the deceased fell from the roof at a place twenty-three feet from the stairway. We cannot say that the board has drawn inferences which no reasonable man could draw, and for that reason we cannot set aside its findings. Upon principle, aside from authority, the findings of the Industrial Accident Board were warranted. The conclusion which we have reached is abundantly supported by the decisions of the English courts. *Marshall v. Owners of Steamship Wild Rose*, [1910] A. C. 486. *Fletcher v. Owners of Ship Duchess*, [1911] A. C. 671.

We have examined all the questions raised by the appeal, but do not discover any reversible error. A majority of the court are of opinion that the entry should be

Decree affirmed.

The case was argued at the bar in November, 1915, before *Rugg, C. J., Braley, De Courcy, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices except *Carroll, J.*

S. H. Batchelder, for the insurer.

C. L. Carr, for the dependent widow.

COMMONWEALTH vs. HARRY SHAMAN.

Suffolk. January 10, 1916. — February 29, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Non-support. Husband and Wife. Judgment.

It is no defence to a complaint under St. 1911, c. 456, § 1, for refusing to provide for the support and maintenance of the complainant as the defendant's wife, that the defendant was induced to marry the complainant by her false representations that she was chaste.

A decree dismissing a libel by a husband under R. L. c. 151, § 11, for annulling his marriage establishes the status of husband and wife and cannot be attacked collaterally by the husband in his attempted defence to a complaint against him under St. 1911, c. 456, § 1, for refusing to provide for the support of his wife.

BRALEY, J. The St. of 1911, c. 456, § 1, for the violation of which the defendant has been convicted, provides, that "any husband who unreasonably neglects or refuses to provide for the support and maintenance of his wife or minor child or children . . . shall be guilty of a crime, and on conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

The defendant contends, the conviction should be reversed because his offer of proof, that he was induced to marry the complainant through her false representations that she was chaste, was erroneously excluded. But, having been content to take her word, the defendant made no preliminary investigation, and her mere antenuptial unchastity furnished no ground for annulment of the marriage, which was valid, even if the parties have never lived together as husband and wife. *Reynolds v. Reynolds*, 3 Allen, 605, 608. *Franklin v. Franklin*, 154 Mass. 515.

The decree moreover dismissing the defendant's libel for annulling the marriage brought under R. L. c. 151, § 11,* established the

* The defendant as a part of his offer of proof, offered the following memorandum filed by the judge who made the decree dismissing the libel for annulling the marriage: "Before the marriage contract between the parties was

status of husband and wife and cannot be attacked collaterally. *Coe v. Hill*, 201 Mass. 15. *Weld v. Clarke*, 209 Mass. 9, 12.

The judge * therefore correctly ruled, that only evidence of her conduct since the marriage was admissible in justification of the defendant's failure to support the complainant.

Exceptions overruled.

The case was submitted on briefs.

J. S. Spencer & N. Golden, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

MARY K. LOFTUS vs. ALFRED G. PELLETIER.

Worcester, October 4, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, In operating automobile, Toward one engaged in common enterprise. *Automobile*.

In an action for personal injuries sustained by being thrown from an automobile alleged to have been operated negligently by the defendant, it may be a question for the jury, as it was under the circumstances of the present case, whether a skidding of the automobile which resulted in its overturning was caused by the defendant's negligence in driving at the rate of more than thirty miles an hour in going round a sharp curve where the road was crowned and its surface was loose and wet.

A district nurse hired and paid by a local organization to attend patients who could not afford a nurse, when called upon to do so by the doctor in charge of such a patient, and whose duty it was to go with a doctor in his automobile at

entered into the libellee represented herself as chaste. In truth she was unchaste and had borne an illegitimate child which died before she became acquainted with the libellant. A marriage ceremony was performed between the parties by a justice of the peace. The libellant knew that this ceremony was valid and was under no apprehension or mistake concerning it. It was intended, however, that a religious ceremony according to the rites of their faith should be performed later. Before the observance of that ceremony the libellant discovered the unchastity of the libellee and brought this libel. He has never had sexual intercourse with the libellee. I rule that the libel cannot be maintained."

* *Callahan, J.*

his request to attend a patient two miles out of town, was injured during such a transportation and brought an action against the doctor for her injuries. *Held*, that it was a question for the jury whether the plaintiff was being carried by the defendant for hire under her contract of employment.

In the case above stated it also was *held* that it could not be ruled as matter of law that the relation of the plaintiff and the defendant at the time of such injuries was that of persons engaged in a common enterprise.

Whether in the case above stated it could have been found that the plaintiff and the defendant were engaged in a common enterprise, or *whether*, if they were, neither of them could sue the other, here were referred to as questions which it was not necessary to consider.

TORT for personal injuries sustained by the overturning of the defendant's automobile in which the plaintiff was being transported under the circumstances stated in the opinion on August 15, 1912, on a road called Mill Circle in the town of Winchendon. Writ dated March 1, 1913.

In the Superior Court the case was tried before *Hall, J.*, who at the close of the evidence, which is described in the opinion, ordered a verdict for the defendant, and at the request of the parties reported the case for determination by this court. If the ruling of the judge was correct, judgment was to be entered for the defendant on the verdict; otherwise, judgment was to be entered for the plaintiff in the sum of \$1,600.

M. McWalter, for the plaintiff.

F. F. Dresser, (*D. W. Lincoln* with him,) for the defendant.

LORING, J. The plaintiff, a district nurse, was injured while being driven by the defendant, a doctor, in his automobile. The jury were warranted in finding that at the time of the accident the defendant was driving the automobile negligently and that his neglect was the cause of the injury to the plaintiff.

The facts were, or could have been found to be, substantially as follows: The defendant had turned out of the main street into Mill Circle, which led "off to the right gradually," and not at a right angle. In going from the main street to Mill Circle there was not much of a grade at first, but later on it "comes pretty steep." The accident happened at "the beginning of the steep pitch." The road was crowned at this point, the surface was somewhat loose and it had rained a little that day. The defendant was in the habit of going over this Mill Circle road two or three times a week and was familiar with the place. Before the defendant took the hill he was running twenty-five to thirty miles an hour, when he came

to the "steep pitch" he "went faster," "opened the throttle on the steering wheel to give more gasoline and to give more speed." Then as he "made a sharp turn to take the hill," at this rate of speed (which it might have been found exceeded thirty miles an hour) the car skidded, ran on the two wheels for forty or fifty feet and then turned over on its left side, the plaintiff being "thrown over the wind shield down on the left side near the front of the car."

It is true that the mere fact of the car's skidding is not evidence of negligence. *Williams v. Holbrook*, 216 Mass. 239. But under all the circumstances of this case it was a question for the jury whether the skidding was caused by the defendant's negligence in driving at a speed of more than thirty miles an hour in going round a sharp curve when the crowned surface of the road was loose and wet. See in this connection *Williams v. Holbrook*, 216 Mass. 239, 241; *Roach v. Hinchcliff*, 214 Mass. 267.

The defendant's main defence is that the plaintiff and the defendant (district nurse and doctor) were engaged in a common enterprise, and that since it has been held that those engaged in a common enterprise are both liable for an accident caused in the carrying out of that enterprise (*Adams v. Smith*, 172 Mass. 521) and that the contributory negligence of one in such a case is to be imputed to the other or others engaged in it (*Beaucage v. Mercer*, 206 Mass. 492), it follows that one of those engaged in the enterprise cannot sue another of them if the one was injured through the negligence of the other. We do not find it necessary to consider whether it could have been found that the plaintiff and the defendant were engaged in a common enterprise, nor whether, if they were, the defendant's contention that neither one could sue the other is well founded. The question we have to decide is whether it had to be ruled as matter of law that the relation between the plaintiff and defendant was that of persons engaged in a common enterprise.

We are of opinion that it could not have been so ruled. The plaintiff was hired and paid by the Women's Club of Winchendon to attend patients (who "could not afford a nurse") when called upon to do so by the doctor in charge of such a patient. She testified that it was "a common thing for the different doctors to take you to their cases when they were making their calls" when the patient was so far out of town as the patient was to whom the defendant was taking the plaintiff at the time here in question.

The patient in question "was over two miles from town." The defendant testified that: "It was her the [plaintiff's] duty to go with me on my request." These two pieces of testimony taken together warranted a finding that a right to be transported to the patient was an implied term of the plaintiff's contract of employment when the patient lived some two miles out of town, and that under that contract the plaintiff was bound to accept the doctor's automobile as the method of that transportation when it was offered to her. From these findings it followed or at least could have been inferred that at the time of the accident the plaintiff was being carried under her contract of employment, that is to say, that she was being carried by the defendant for hire.

The result is that the plaintiff's exceptions must be sustained; and that (in accordance with the stipulation of the parties) judgment must be entered for the plaintiff in the sum of \$1,600. It is

So ordered.

CHARLES E. MAIN vs. COUNTY OF PLYMOUTH.

Plymouth. October 22, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Way, Public: laying out. *Damages*, Indemnity for loss and expense due to abandoned taking. *Practice*, Civil, Costs.

Under the provision of the highway act, contained in R. L. c. 48, § 13, that "if no entry is made upon the land [for the purpose of laying out a highway] or if the location has for any other cause become void, a person who has suffered loss or been put to expense by the proceedings shall be indemnified therefor by the commissioners," one, who opposed before the county commissioners the granting of a petition to lay out a highway across his land, and, after the petition was granted by the county commissioners, filed and successfully maintained a petition for a writ of certiorari to quash the order for the laying out, is not entitled to be indemnified for counsel fees and other expenses and for loss of time incurred in relation to these matters.

RUGG, C. J. This is a petition under R. L. c. 48, § 27,* to recover indemnity for loss suffered and expense incurred by the plain-

* In the Superior Court the case was tried before *Brown*, J., who reported it for determination by this court of what, if any, sum should be allowed to the petitioner as indemnity under R. L. c. 48, § 13.

tiff in connection with proceedings touching the laying out of a way. In November, 1909, a petition was filed with the county commissioners of Plymouth County, relative to a way across the plaintiff's land. The plaintiff from the first opposed the granting of the petition, whereby he incurred expenses for witnesses, surveyors and attorneys, as well as loss of his own time. After hearing and deliberation, the county commissioners made a decree in April, 1911, laying out the way. The plaintiff thereupon filed a petition for a writ of certiorari to quash this decree, in which he was successful. *Main v. County Commissioners*, 212 Mass. 182. In the prosecution of that petition he incurred expenses for counsel fees and otherwise. The disbursements and loss of time in connection with each of these matters form the subject of this petition.

The governing statute is R. L. c. 48, § 13.* Its meaning as applied to the facts of the case at bar may be made clearer by an examination of its history. St. 1842, c. 86, § 1, is the first statute bearing on the subject. It there was enacted, after providing for the estimation of damages sustained by any person in his property by the laying out of a way, that such damages should not be paid nor should the injured landowner have a right to demand them until the land was entered upon for the purpose of constructing the way. Then followed these words: "Provided, nevertheless, that when any person so claiming damages shall have been put to any trouble and expenses by said proceedings, the county commissioners shall allow him full indemnity therefor, although his land may not be entered upon or taken possession of in pursuance of said proceedings." As the law stood before the passage of that statute, a landowner was entitled to recover and collect his full damages due to the layout of a way although his land might never have been entered on and the way had been discontinued before the trial of his petition for damages. *Harrington v. County Commissioners*, 22 Pick. 233.

* That statute is as follows: "The commissioners shall estimate the damages, if any, sustained by persons in their property by the laying out, relocation, alteration or discontinuance of a highway, and shall, in their return, state the share of each separately; but such damages shall not be payable until the land over which the highway or alteration is located has been entered upon and possession taken for the purpose of constructing it. But if no entry is made upon the land or if the location has for any other cause become void, a person who has suffered loss or been put to expense by the proceedings shall be indemnified therefor by the commissioners."

That the statute resulted from that decision has been recognized in *Harding v. Medway*, 10 Met. 465, *Drury v. Boston*, 101 Mass. 439, *Corey v. Wrentham*, 164 Mass. 18, and *Munroe v. Woburn*, 220 Mass. 116. Interpreting the statute in the light of that decision, it is plain that its primary design was to avoid the unjust result of enabling a landowner to recover full damages although his land never in fact had been taken from him, nor his possession disturbed. A concurrent purpose doubtless was to afford indemnity to a landowner who claimed damages by reason of the layout of the way, for trouble and expenses to which he had been put by the proceedings incident to that layout. The plain effect of that statute was to allow such indemnity only to a person "so claiming damages," that is, to one, an easement in whose land was seized but not actually entered upon in consequence of the layout. It gave no right to anybody who was not in a position to claim damages by reason of a valid taking of an easement in his land. The conclusion cannot be escaped that no trouble or expense antecedent to the layout was included in the indemnity provided by that statute. The indemnity further was confined to the trouble and expenses growing out of "said proceedings," which means the proceedings whereby the layout was made but never constructed. It did not refer to any other proceedings. Manifestly, in this state of the law, no landowner could claim indemnity for trouble or expense caused by demonstrating through action in court or otherwise that a pretended layout was illegal. Nor did the statute provide indemnity for loss occasioned to the landowner by opposition to the petition or other proceedings which preceded the layout. The landowner was prevented from collecting his damages caused by the layout until there should be an entry for constructing the way. It was only for the trouble and expense incident to this circumstance that the statute afforded relief.

The landowner was in a difficult position. Under the law as it then was, if he was dissatisfied with the award of damages made by the county commissioners, he was obliged to make his application for a trial by jury within six months from the time of the layout, quite regardless of the fact whether there had been an entry upon the land for purposes of construction or not. Rev. Sts. c. 24, § 14. Therefore he well might be caused the expense of a jury trial to determine damages which never would become pay-

able. It was to reimburse the landowner for such and similar necessary expenses that the statute of 1842 made provision.

The subsequent history of the statute does not show that in this respect it has been broadened so as to include the kind of loss and expense here sought to be recovered. There is no material change in Gen. Sts. c. 43, § 14, and Pub. Sts. c. 49, § 14. The phrase in these two laws is the same, namely: "But when a person so claiming damages has been put to trouble and expense by the proceedings, the commissioners shall allow him full indemnity therefor, instead of the damages awarded, although no entry is made upon his land." The only changes in the last revision now found in the section of the Revised Laws already quoted, are (1) the substitution of the word "loss" for "trouble," as to which see *Whitney v. Lynn*, 122 Mass. 338, 343, a matter of no consequence in the case at bar; (2) an inclusion among those entitled to indemnity of persons affected by a void as well as by a lapsed layout; and (3) the omission of the words "so claiming damages" as qualifying the "person" who has suffered loss or been put to expense by the proceedings. The extension of the indemnity clause to those suffering loss and incurring expense in instances where the laying out of the way is found to have been invalid cannot fairly be construed to enlarge the kind of indemnity to include items of loss and expense never before allowed. The same indemnity is extended to a new class of cases. But it is not expanded so as to include losses and expenses arising out of collateral matters never before included in the indemnity provision.

There is nothing in the report of the commissioners for the drafting of the Revised Laws, which indicates a purpose to make radical changes in the law in this respect, or to go beyond the somewhat narrow extension manifested by the plain words in their natural sense. The modifications in the phrase of the act when it was enacted in its present form in the Revised Laws, do not disclose a legislative purpose to modify in this respect the pre-existing law. It is a familiar principle of statutory construction that mere verbal changes in the revision of a statute do not alter its meaning and are construed as a continuation of the previous law. *Great Barrington v. Gibbons*, 199 Mass. 527, 529. *Paszkowski v. Stony Brook Paper Co.* 210 Mass. 86, 89. *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72, 74.

The case is somewhat analogous to the expenses which a party to a petition for the abolition of a grade crossing is entitled to charge to the cost of the scheme. Those which necessarily forward the project may be so charged, *Boston & Albany Railroad v. Charlton*, 161 Mass. 32, while those which relate to the exploitation of the views of parties as to methods, may not be so charged. *Providence & Worcester Railroad, petitioner*, 172 Mass. 117.

Under the instant statute, the landowner may be indemnified for the losses and expenses which are inherent in the protection of his property rights in connection with a layout and ensuing from that as a natural result. But those arising out of adversary proceedings undertaken by the landowner in opposition to the general scheme, either in fact or law, are not subject for indemnity. They stand on the same footing as ordinary actions at law or other antagonistic procedure involving the validity or discretionary conduct of public officers and boards. See *Sears v. Nahant*, 215 Mass. 234, for a general discussion by Mr. Justice Hammond of kindred instances of indemnification for costs and expenses.

It follows, therefore, that the loss and expense which the plaintiff may recover in this proceeding do not embrace his loss and expenses in opposing the initial petition at the hearings before the county commissioners, nor in bringing the petition for certiorari by which the decree of the county commissioners was declared invalid.

Petition dismissed.

E. V. Grabill & G. Edmunds, for the petitioner, submitted a brief.

H. W. Brown, for the respondent.

MANUEL FRANCO vs. JACOB MAKER.

JACINTHO R. MERCEDE vs. SAME.

Bristol. October 25, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Negligence. Of one controlling real estate, In causing damage by fire.

Where a tenant of an apartment in a tenement house declared to his landlord his intention to move out the next day unless certain frozen sewer pipes in the house were thawed out, whereupon the landlord agreed to thaw out the pipes and, in attempting to do so, did it negligently and set the house on fire, causing property of the tenant to be damaged or destroyed, in an action for such damage and loss it was held, that the jury were warranted in finding that the plaintiff impliedly agreed to remain as the defendant's tenant if the defendant would thaw out the pipes, and that, on such a finding, the defendant's undertaking was not gratuitous but for a valid consideration and in its performance he was bound to exercise reasonable care and skill and was liable to the plaintiff for damage caused by his failure to exercise such care and skill.

TWO ACTIONS OF TORT, each by a tenant in a tenement house owned and controlled by the defendant in Eagan's Court back of Spring Street in Fall River, for damage to and loss of property by reason of a fire alleged to have been caused by the defendant's negligence on February 12, 1912. Writs in the Second District Court of Bristol dated February 15, 1912.

On appeal to the Superior Court the cases were tried together before *Hall, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to rule that upon all the evidence the plaintiffs could not recover. The judge refused to make this ruling, and submitted the cases to the jury, who returned a verdict for the plaintiff Franco in the sum of \$300 and a verdict for the plaintiff Mercedes in the sum of \$75.

A. S. Phillips, for the defendant.

F. M. Silvia, for the plaintiffs.

CROSBY, J. The defendant was the owner of a two story house containing four tenements on each floor. The plaintiffs occupied the northerly tenement on the second floor. During a period of

very cold weather the water and sewer pipes in the house became frozen. The main sewer pipe was in the cellar and extended from the ground up to within eighteen inches of the floor joists of the first floor, and other sewer pipes leading to the various tenements were connected with it.

There was evidence that the plaintiffs had told the defendant that unless the sewer pipes could be cleared of ice they would move the next day, and that "the defendant offered to do what he could to relieve the existing condition."

There was also evidence to show that on the same evening that the plaintiffs had threatened to move the defendant and another tenant undertook to thaw out the sewer pipes in the cellar; that they wrapped burlap around the ends of two iron pipes, soaked the burlap in kerosene and, after setting fire to the burlap, held it close to the sewer pipe; that shortly afterwards the house was discovered to be on fire and by reason of the fire certain personal property of the plaintiffs was damaged. This action is brought to recover for the damages so sustained.

There was evidence from which the jury were warranted in finding that the plaintiffs impliedly agreed to remain as the defendant's tenants if the defendant would thaw out the pipes. If so, the defendant's undertaking was not gratuitous, but was for a valid consideration, and, having attempted to perform it, he was obliged to exercise reasonable care and skill, and if by negligence in doing the work, the property of the plaintiff was injured or destroyed, the defendant would be liable in damages.

There was ample evidence from which the jury would have been justified in finding that the house was set on fire by the defendant, or by his tenant who was assisting him, and that the tenant was acting under the direction and control of the defendant. The jury also might have found that the method adopted to thaw the pipes was negligent in view of the fact that the end of the frozen sewer pipe where the lighted torch was applied was only eighteen inches from the wooden floor and timbers above it. The case was properly submitted to the jury, and the entry must be

Exceptions overruled.

ROSE D. DUPUIS & another vs. CITY OF FALL RIVER.

Bristol. October 25, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Municipal Corporations, Officers and agents. Public Officers. Equity Jurisdiction. To restrain a city from causing water to overflow from a highway on land of the plaintiff.

One whose land is damaged by water overflowing upon it from a highway in a city by reason of the arrangements made by the surveyor of highways of the city for the disposal of surface water at a street junction adjoining the land, cannot maintain a suit in equity against the city for an injunction or for damages.

The surveyor of highways of a city, who also is its superintendent of streets, in constructing a system of underground drains and catch basins for the purpose of disposing of surface water collecting upon the streets of the city in order to keep such streets reasonably safe and convenient for travel, is a public officer discharging a public duty and is not the agent of the city. Following *Smith v. Gloucester*, 201 Mass. 329.

BILL IN EQUITY, filed in the Superior Court on December 18, 1912, by Rose D. Dupuis and the Grocer's Supply Company, Ltd., a corporation, against the city of Fall River, seeking an injunction restraining the defendant from maintaining a system of sand catchers and drain pipes to divert, or from diverting in any other way, surface water from its natural course in Eastern Avenue and other streets in that city over and upon the premises of the plaintiffs, and praying also for damages arising from the alleged unlawful diversion of such surface water.

In the Superior Court the case was heard by *White, J.*, upon a master's report. The material facts found by the master are stated in the opinion.

The judge made a final decree confirming the master's report and ordering that the bill be dismissed. The plaintiffs appealed.

The case was submitted on briefs.

A. S. Phillips & T. C. Crowther, for the plaintiffs.

G. Grime, for the defendant.

RUGG, C. J. This is a suit in equity whereby the plaintiffs seek to restrain the defendant from causing water to overflow from a highway upon their premises, and for damages. The material facts have been found by a master, as follows: The plain-

tiffs' premises are located on Eastern Avenue near its junction with Pleasant Street in Fall River. A natural brook drained a swamp and crossed Eastern Avenue at a place distant several hundred feet from Pleasant Street, and flowed into a pond. More than twenty years before this suit was brought that brook was filled and a pipe laid across Eastern Avenue in the general direction of the former course of the brook, to connect ultimately at a considerable distance with a plank drain in another street. The city of Fall River furnished part of the material and the work for putting in this pipe. It is, perhaps, inferable that a part of this pipe lies outside the limits of Eastern Avenue, though this is not clear on the record. A considerable part of the swamp has been filled and devoted to buildings and streets. The "outlet drain from this . . . swamp has been allowed to fill up so that a large quantity of water finds its way from" the swamp on to Eastern Avenue, in which it flows, by reason of changes in grade, to its junction with Pleasant Street, a point outside its original natural water shed, whereby the volume of water at this place is increased. This water formerly drained into the natural brook "at the location where the city constructed a plank drain and laid its connecting pipes, which . . . drain and pipes have since become stopped up by alluvial deposits." This plank drain seems to have been the one before mentioned, at a considerable distance from Eastern Avenue, in another street. A quantity of surface water also collects at this point, from other streets. "Not in the nature of the laying out of a street or of specific repairs thereon, but solely for the purpose of relieving the congestion of water (in times of heavy rain) at the junction of Eastern Avenue and Pleasant Street, the city has constructed a system of underground pipes and piping connected with sand catchers," which collects the water from two corners and the centre of the square made by the junction of these two streets and brings it to the surface again on Eastern Avenue, so that a larger volume of water than is natural discharges and flows along and over Eastern Avenue adjacent to the plaintiffs' premises. Nevertheless, the ordinary flow of all the water would not be sufficient in volume and force to flood the plaintiffs' land and premises, were it not for the construction of these pipes at the junction of the street and avenue. The construction and maintenance of "the system of underground pipes and piping connected with

sand-catchers" at this street junction is "the largest contributing factor to the extra amount of surface rain water which, in times of heavy rain, runs on to the plaintiffs' property." This system was constructed, without any vote by the board of aldermen or of the city council, by the surveyor of highways of the defendant city, who was also the superintendent of streets.

On these facts, no liability on the part of the city is established. The proximate efficient cause of the injury sustained by the plaintiffs is the construction of the system of underground drains and "sand-catchers," which appear to be a kind of catch basin. This work was not done by order of the city or any of its authorized agents. It was done by the surveyor of highways in the performance of his ordinary duty of keeping the streets and ways reasonably safe and convenient for travel. Such work done by that officer is not in law the act of the city. He is a public officer discharging a public duty. He is not the agent of the city. His negligence is not the negligence of the city. The circumstance that he also is referred to as the superintendent of highways, without facts indicating that he is the servant of the city, such as were shown, for example, in *Butman v. Newton*, 179 Mass. 1, does not constitute him anything more than or different from a surveyor of highways, and hence a public officer and not a municipal agent. This field of legal responsibility is discussed at large, with ample review of the authorities, in *Smith v. Gloucester*, 201 Mass. 329. It is not necessary to do more than refer to that decision, which is controlling of the present. See, also, *Hathaway v. Everett*, 205 Mass. 246; *Donohue v. Newburyport*, 211 Mass. 561, 565; *Flagg v. Worcester*, 13 Gray, 601; *Holleran v. Boston*, 176 Mass. 75; *MacGinnis v. Marlborough-Hudson Gas Co.* 220 Mass. 575. The fact that, by the establishment of the grades of several streets, a greater volume of surface water collected at the junction of these two streets, is not of consequence. Other means are provided for the recovery of property damage sustained from that cause. *Woodbury v. Beverly*, 153 Mass. 245.

It is not necessary now to consider or decide what may be the liability, if any, of a city or town to one sustaining an injury directly resulting from the failure of its highway surveyor to keep open and clear from obstruction a passage for a brook or other natural water course under a highway laid out and constructed by public officers

and not by private agents. As to this point, see *Lawrence v. Fairhaven*, 5 Gray, 110, and *Parker v. Lowell*, 11 Gray, 353, in the light of *Johnson v. Somerville*, 195 Mass. 370, 376, 382, and *Bates v. Westborough*, 151 Mass. 174, as interpreted in *Smith v. Gloucester*, 201 Mass. 329, 335, 336. See, also, *Stanchfield v. Newton*, 142 Mass. 110, and 28 Harvard Law Review, 478, 482. In the case at bar, it is manifest on the master's report that the clogging of the "plank drain" and the "pipe" under Eastern Avenue where the natural water course flowed, was not a direct and proximate cause of the plaintiffs' injury. The real cause was the nature of the arrangements made at the street junction for the disposal of surface water. Moreover, it is not made clear by the report that the pipe by which the waters of the brook were conducted under Eastern Avenue was the property or under the exclusive control of the defendant, although possibly this may be inferred.

There is nothing to indicate that there is any sewer or main drain, or work authorized by special statute, involved in the causation of the plaintiffs' injury. Therefore, cases like *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223, *Haskell v. New Bedford*, 108 Mass. 208, *Brayton v. Fall River*, 113 Mass. 218, *Nevins v. Fitchburg*, 174 Mass. 545, *Westcott v. Boston*, 186 Mass. 540, and *Diamond v. North Attleborough*, 219 Mass. 587, have no relevancy.

Decree dismissing bill affirmed with costs.

ANTONY SELIBEDEA vs. WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY.

Worcester. November 3, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway. Evidence, Matters of common knowledge. Words, "Fast."

Where a boy about fifteen years of age in crossing a street on his way to a store was on the top of a bank of earth, fourteen inches high and about two feet distant from the nearer rail of a street railway track, that had been dug from a trench by the side of the track, and where the forward part of a car on the track, going "fast" but not at an undue rate of speed for such a place, passed the boy, when his foot slipped on the loose earth and he came in contact with the

middle of the side of the car and was injured, it was *held*, that there was no evidence of negligence on the part of the motorman operating the car, whether he saw the boy or not; because, if he saw him, he saw him standing upon the bank apparently in a place of safety.

Evidence that a street railway car was going "fast" without any other indication of its rate of speed and without regard to the conditions existing at the time is too uncertain and indefinite to warrant a finding of negligent or improper operation. The fact that a street railway car, in passing a boy who was standing on a bank of earth, created a current of air is not evidence of an undue rate of speed. It is a matter of common knowledge that street railway cars cannot be run at any considerable rate of speed without creating a current of air.

TORT for personal injuries sustained on June 11, 1913, when the plaintiff was fourteen years and ten months of age, from being struck by the side of a street railway car alleged to have been operated negligently by servants of the defendant on Bloomingdale Road, a public highway in the city of Worcester. Writ dated July 16, 1913.

In the Superior Court the case was tried before *Hall, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to rule that upon all the evidence and the pleadings the plaintiff could not recover and that the verdict must be for the defendant. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,000. The defendant alleged exceptions.

A reduced copy of a part of the plan referred to in the opinion is printed on page 78.

The case was submitted on briefs.

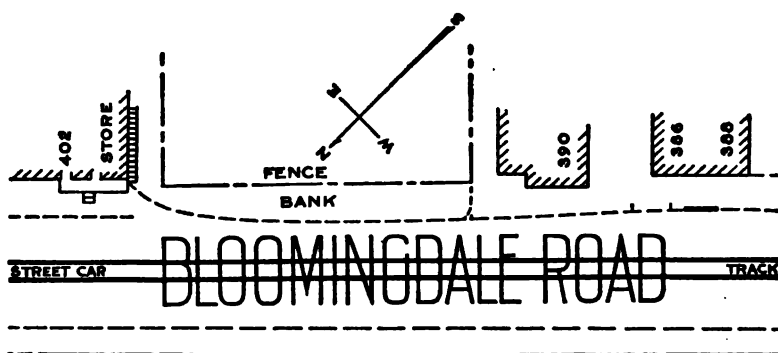
C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

J. F. McGrath & W. A. Loughlin, for the plaintiff.

CROSBY, J. The plaintiff, while upon a highway called Bloomingdale Road in the city of Worcester, came in contact with a car of the defendant and received the injuries for which he seeks to recover in this action. At the time he was injured he was fourteen years and ten months old. The accident occurred on June 11, 1913, at about twenty-five minutes past nine o'clock in the evening.

Bloomingdale Road is a street three rods wide, running in a northeasterly and southwesterly direction. The defendant maintained a single track in about the centre of the street. Before the accident a trench had been dug by the Worcester Gas Light Company

on the southeasterly side of the street which, at the time of the accident, was open from a point a short distance northeast of No. 402 Bloomingdale Road to a point southeast of No. 388 on the same street, and dirt and other material from the trench had been thrown upon the street upon both sides of the trench. At the place of the accident there was a bank of dirt about fourteen inches high along the southeasterly rail and about two feet distant therefrom. There was no sidewalk on this side of the street in front of the premises No. 388, where the plaintiff lived, and a plank was placed across the trench in front of these premises over which persons might walk. Shortly before the plaintiff was injured he



was sent upon an errand by his father. He intended to go to a store at No. 402 which was northeast of the place where the plaintiff lived and on the same side of the street. When he came out of the house he saw a car coming toward him from the east several hundred feet away. He crossed over the plank above referred to, and, crossing the street railway track, reached the opposite side of the street and proceeded along the sidewalk. Leaving the sidewalk he crossed the street in a diagonal direction toward the store. He testified that after crossing the track he took a few steps but before reaching a plank which was across the trench about in front of the store the car came along and he could go no farther and stepped on the bank of dirt which extended alongside the track; that the forward part of the car passed him, and when he was about opposite the middle part his foot slipped in the dirt and he was struck by the side of the car and knocked down and injured. He testified that the car was going fast and that "wind came by like that and made me slip like that and the car got

into me." Later in cross-examination, he said in substance that he slipped while standing upon the dirt and that the wind did not cause him to slip. The motorman testified that he did not see the plaintiff and did not know of the accident until some time afterwards. Aside from the testimony of the plaintiff, there was no evidence as to the circumstances attending the accident.

While the jury were not bound to accept the motorman's testimony that he did not see the plaintiff or might have found that he would have seen him if he (the motorman) had been in the exercise of due care, still we are of opinion that, if the motorman is chargeable with knowledge of the presence of the plaintiff, the latter was standing upon the bank apparently in a place of safety when the forward part of the car passed and there was no reason to assume that he would be injured. If the motorman saw him, he had a right under the circumstances to assume that the plaintiff was far enough away from the track not to be struck. He was right in that assumption because it appears upon the uncontradicted testimony that the plaintiff was not struck by the car, but that his foot slipped upon the dirt and he came into contact with the side of it. We do not think the motorman could be expected to anticipate so unusual an occurrence.

Upon the facts as disclosed by the evidence, we are of opinion that there was no evidence of negligence on the part of the defendant. Accordingly we need not consider whether the plaintiff could have been found to have exercised reasonable care.

The plaintiff testified that the car was going fast and that the speed was uniform. If the car was going fast, there is no evidence to show that at that time and place, under the circumstances, its rate of speed was unusual or improper. Evidence that a car is running "fast" without anything to indicate its rate of speed, or the existing conditions at the time, is evidence too uncertain and indefinite to warrant a finding of negligent or improper operation.

If the movement of the car as it passed the place where the plaintiff stood created a current of air, that is not evidence of an unreasonable rate of speed. It is common knowledge that cars cannot be run at any considerable speed without such a movement of air. *Furey v. Worcester & Southbridge Street Railway*, 203 Mass. 434.

The facts in this case are quite different from those in *Gray v.*

Batchelder, 208 Mass. 441, relied on by the plaintiff. In that case the plaintiff was hit by the swerving of the rear end of an automobile after the forward part of it had passed her. The plan in the case at bar shows that the defendant's track was straight at the place of the accident and that the plaintiff could not have been hit by the car if he had not slipped and fallen against it after the forward part had passed him. This case is much like *Osborne v. Bay State Street Railway*, 222 Mass. 427, recently decided by this court.

We are of opinion that the defendant's request that the plaintiff could not recover should have been given. The exceptions must be sustained and judgment entered for the defendant in accordance with St. 1909, c. 236.

So ordered.

J. STANLEY BROWN, trustee in bankruptcy, vs. THOMAS
RUSHTON.

Essex. November 3, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Performance and breach. Stockbroker. Bankruptcy, Rights of trustee.

Where a stockbroker upon the order of a customer buys certain shares of stock for which he pays and receives the certificates indorsed in blank by their former holders, and keeps the certificates in his office intending to hold them subject to directions from his customer and to deliver the identical certificates to him upon payment of the amount due for them, but does not tender the certificates to his customer and demand payment, and, the broker having been adjudicated a bankrupt, his trustee in bankruptcy, about nine months after the purchase of the stocks and eight months after the trustee's appointment, tenders the certificates to the broker's customer, and, on payment being refused, sells the stocks on the market at a loss and sues the broker's customer for the difference between the cost of the stocks to the broker and their selling price, he is not entitled to recover; because the title to the stocks remained in the broker and passed to the trustee and no tender of the stocks was made by the broker, and, if the trustee had a right to affirm the contract, he lost it by failing to make a tender of the certificates within a reasonable time.

RUGG, C. J. This is an action by a trustee in bankruptcy of Fisk and Robinson, stockbrokers, to recover the difference between the cost and the sale price of certain stocks bought for the defendant. This was not intended as a margin, but as a cash trans-

action. The defendant, in Boston, ordered shares of stock in three different corporations of the brokers, who had offices in Boston and New York, on January 26, 1910. His order was transmitted to New York, where the stocks were purchased in a day or two, paid for in full, and certificates in the names of third persons indorsed in blank delivered to the brokers, notices of the purchases being seasonably sent to the defendant. The certificates were placed in a general envelope, marked "Customers, Fisk & Robinson, Boston," and kept in the New York office. The brokers intended to hold these certificates subject to directions from the defendant, and send them to Boston to be there delivered to him on payment of the amounts due them thereon. Bankruptcy supervened by the filing of a petition against the brokers on February 1. A receiver was appointed a day later, and the plaintiff was appointed trustee on March 21, 1910.

There was undisputed evidence that reasonably soon after the appointment of the receiver the defendant went to the Boston office of the brokers and tendered the amount due and demanded his stock, which was refused by the person in charge, and a letter was written by the defendant's attorney to the receiver, demanding the stocks and offering to pay for them on delivery, which was refused. These circumstances were not the equivalent of demand and tender to the bankrupt or to the plaintiff. The defendant took no steps to protect his rights in the bankruptcy court. In the following November, a demand was made by the plaintiff upon the defendant for the payment of the amount due, with a proffer of the certificates of stock on payment. The defendant refusing to pay, the stocks were sold later by the plaintiff on the market at a loss from their purchase price, and this action of contract is to recover that difference. The trial judge * found also that from the time of their purchase the stocks were held by the bankrupts for the defendant at his risk, and this fact was known or should have been known by the defendant, and that it was the understanding that the particular certificates which were delivered to the bankrupts in New York were to be held for and delivered to the defendant on a proper tender, and the defendant was not bound to receive other certificates. These findings are not challenged by either side.

* *Raymond, J.*

The trial judge ruled rightly upon this state of facts that the plaintiff could not recover. The case is governed by *Wood v. Hayes*, 15 Gray, 375. There, as here, the broker was employed by his customer to buy stocks wholly out of the broker's money. The broker executed the order. Thereafter, upon a settlement, there was an indebtedness from the customer to the broker. The customer gave his note to the broker, who acknowledged that he held the shares of stock as security for the payment of the note. The broker died. The plaintiff had not demanded his stock or offered to pay the note. At the broker's death, he had no shares of stock in his own name or in the name of his customer, but owned shares which he had pledged; at any time before his death the broker, or after his death his administrator, could have procured shares for the customer upon demand for them and payment of the note. There, as here, the stock fell substantially in value after the purchase by the broker. The customer contended that the broker had no right to pledge the shares and that his estate was responsible for their value at the time they were purchased. Chief Justice Shaw, in delivering the opinion of the court, said: "Lobdell [the broker] advanced the money to buy the shares for account of Wood, [the customer] and held the shares in his own name. It stood on the footing of contract. The contract was strictly conditional, to deliver so many shares on payment of so much money. The money was never paid and the title to have performance never accrued." In *Wood v. Hayes*, the purchase was not upon margin, because the customer paid nothing until he gave his note, and he never paid the note in whole or in part. In that respect that case is at least as favorable to the broker as is the case at bar. There are four distinctions between that case and the one at bar, but they are all immaterial as to the point here involved. The first is that there the broker held the shares in his own name, while here they held them indorsed in blank just as they were delivered. The second is that there, apparently, any shares might have been delivered, while here, specific certificates were expected to be delivered. The third is that in *Wood v. Hayes* the customer, apparently at some interval after the stocks were bought, gave his note to the broker, who held the stocks as security; while in the case at bar, no note was given. The fourth is that there the customer was seeking to hold the broker, while

here the broker is seeking to hold the customer. *Wood v. Hayes* has been regarded as authority, and followed in more recent cases. It has never been criticized in our own decisions. *Day v. Holmes*, 103 Mass. 306, 311. *Covell v. Loud*, 135 Mass. 41, 44. *Weston v. Jordan*, 168 Mass. 401. *Chase v. Boston*, 180 Mass. 458, 459. *Rice v. Winslow*, 180 Mass. 500, 502. *Furber v. Dane*, 203 Mass. 108, 116. It has been recognized as the foundation of the Massachusetts rule that ordinarily the title of stocks purchased by a broker for his customer remains in the broker until delivery. *Richardson v. Shaw*, 77 C. C. A. 643; *S. C.* 209 U. S. 365, 381. *Skiff v. Stoddard*, 63 Conn. 198, 214.

This conclusion appears to be supported by *In re Swift*, 50 C. C. A. 264, where at page 267 it was said by Judge Putnam: "We accept the law as well settled, alike by local usage in Massachusetts, where the dealings took place, and by the implied necessities of public transactions in stocks, as well as by general acquiescence and sound sense, that the ordinary relations between stockbrokers and their customers are executory for the sale and purchase of stock. We have, therefore, to deal with an agreement by which the bankrupts bound themselves to deliver certain stocks to Dee on payment of the balance due from him to them, and by which also the bankrupts were entitled, on reasonable notice, to tender the stocks to their customer and claim like payment. But neither party fulfilled the ordinary conditions applicable to such relations. Neither made a demand or tender. Consequently, according to the ordinary rules of law, no cause of action arose in favor of either party against the other."

If it be assumed that the intervention of bankruptcy would have enabled the trustee to elect to affirm the contract, the plaintiff is in no better posture. It was in substance found as a fact, so far as it is a fact, that the plaintiff as trustee did not elect within a reasonable time to affirm the contract, and that there were no special circumstances which justified so long a delay. It is plain that as matter of law the delay from his appointment in March until November, or even from the time when he took possession of the stocks in July, until November, was unreasonable delay in exercising whatever option the trustee may have had.

The case at bar is quite different from *Chase v. Boston*, 193 Mass. 522, relied upon by the plaintiff. In that case, there was a

specific agreement as to the time when title to stocks vested in the customer of the broker.

The refusals to rule as requested by the plaintiff were all warranted by *In re Swift*, 50 C. C. A. 264, upon which the trial judge relied, which is an amplification of *Wood v. Hayes*, 15 Gray, 375.

Exceptions overruled.

F. W. Knowlton, (C. O. Pengra with him,) for the plaintiff.

H. L. Burnham, for the defendant.

COMMONWEALTH vs. EDWARD G. PERKINS.

Suffolk. November 4, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Harbor of Boston, Regulations of harbor master. Harbor Master.

A regulation made by the harbor master of the harbor of Boston, that sailing vessels shall anchor in a part of a designated area off Bird Island flats that is not "reserved for steamers, exclusively," means that a vessel must anchor so that at all times it will lie wholly within the area designated for vessels of that class, and so construed the regulation is a reasonable one and therefore valid.

LORING, J. This is a complaint against the master of a towboat for allowing a schooner which he had in tow to anchor in violation of R. L. c. 66, §§ 21, 28, in a place not provided for the anchorage of schooners by the regulations of the harbor master of the harbor of Boston.

No question was made as to the constitutionality of R. L. c. 66, § 21, nor as to the adoption by the harbor master of the regulation in question. The case went to the jury on a defence of necessity set up by the defendant. Under instructions as to that defence, to which no exception was taken, the jury found the defendant guilty.

The presiding judge * ruled as matter of law that the regulation in question was valid and to that ruling the defendant took an exception.

* *Callahan, J.*

The regulation in question provided (first) that all vessels anchoring in the upper harbor should anchor within a defined area about one thousand feet wide and six thousand feet long lying off Bird Island flats, and (secondly) that the upper quarter of this area (referred to at the trial as "area A") should be "reserved for steamers, exclusively." The defendant allowed the schooner which he had in charge to anchor within area A.

We are of opinion that this regulation was reasonable and therefore valid.

1. It must be apparent even to one not conversant with such matters that sailing vessels with their masts and rigging and steamships with none or substantially none will swing (when at anchor) in different directions if the wind is blowing in one direction and the tide running in another. And that by reason of this if the two kinds of vessels are lying close to each other as they must at times lie in the limited anchorage of the upper harbor, they will be apt to foul one another when at one and at the same time there is a strong tide running in one direction and a high wind blowing in another. The object of the regulation here in question was to avoid such collisions taking place under those conditions. And such in effect was the testimony of the harbor master as to the purpose he had in mind in adopting the regulation here in question. To this should be added that the harbor master testified that until within "two or three or four years" "the steamer fleet has [had] increased from nothing up to about sixteen in the fleet." By this we understand the harbor master to have meant that until within two or three or four years there was no occasion for the adoption of the regulation here in question. This regulation was adopted on May 20, 1914.

If the true construction of the regulation had been (as the defendant has contended that it is) that a vessel did not violate the regulation where it dropped its anchor within the area and swung when at anchor outside of it, there might perhaps be difficulty in coming to the conclusion that the regulation was a reasonable one. Upon that question we do not find it necessary to express an opinion. In our opinion the regulation by its true construction provides that a vessel must anchor so that at all times it will lie wholly within the defined area.

2. Beside attacking the validity of the regulation on the ground

that it was not reasonable the defendant has contended that "the harbor master has assumed in the regulation, not only a directive power, but a prohibitive power, and it is therefore invalid." There is nothing in this objection. By this regulation it is in effect provided that sailing vessels should anchor in that part of the described area off Bird Island flats which is not thereby reserved for steamers exclusively.

3. The defendant further has contended "that the subject matter of the regulation here in question is not in and of itself the proper subject of penal restraint, and entirely within the cognizance of the court, which neither requires nor admits of evidence, and therefore that the trial judge erred in not receiving the evidence offered by the defendant which tended to show the circumstances and conditions upon which the regulation would operate." The offers of proof made by the defendant and excluded by the presiding judge were six in number and are set forth below.* There is nothing in these offers of proof which would aid the court in giving to the regulation in question its true construction.

4. We have examined all the cases cited by the defendant. There is nothing in them which requires special notice.

The entry must be

Exceptions overruled.

The case was submitted on briefs.

B. B. Libby, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

* The offers of proof excluded by the presiding judge were as follows:

"1. That Bird Island Anchorage has always been an anchorage for deep-draught vessels, that it is the most convenient anchorage in Boston Harbor for such vessels to use upon arrival, and that until May 20, 1914, there has been no regulation restricting the use of the anchorage in favor of any class of vessels.

"2. That on April 13, 1914, the harbor master sent the following letter to the various towboat companies operating in Boston Harbor:

"City of Boston,
Police Department, office of the Harbor Master
Police Station No. 8, April 13, 1914.

"Gentlemen,—I do not wish to discriminate against any class of vessels in their use of the Bird Island Anchorage, but it is my opinion that vessels that

FRANCIS C. WELCH & another, administrators, vs. TREASURER
AND RECEIVER GENERAL.

Essex. November 4, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Tax, On legacies and successions. Jurisdiction. Conflict of Laws. Words,
“Legally subject.”

Under St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, providing in substance that property of a resident of this Commonwealth which is not therein at the time of his death shall not be subject to a legacy tax if “legally subject” in another State or country to a tax of like character and amount to that here imposed, and that, if it is “legally subject” in such other State or country to a tax of like character but less in amount than that here imposed, which shall be actually paid or secured, it shall be taxable here only for the difference, it is for the courts of this Commonwealth to determine whether such property is “legally subject” to such a tax in another State or country.

By the foregoing provisions, the Legislature intended to surrender the power of this Commonwealth to impose a succession tax upon property of a resident of this Commonwealth which is not therein at the time of his death only when a succe-

require a berth for a few hours or for a day or so at most and are arriving almost daily should be allowed some choice of berth against those who are using the anchorage to remain sometimes for weeks at a time.

“You are hereby requested to instruct your captains that whenever possible they will keep the berth on the upper corner of said basin clear.

Very respectfully yours,

Capt. Francis J. Hird,
Harbor Master.”

“3. That on May 20, 1914, the harbor master made the regulation reserving the upper corner of said anchorage solely for steamers.”

“5. That the schooners using Bird Island Anchorage are all of American register, while a fair percentage of the steamers which use it are of foreign register. That the portion of Bird Island Anchorage open to schooners is frequently congested at a time when that reserved for steamers is clear.

“6. That enforcement of the regulation as made would cause loss to tow-boat companies and sailing vessel owners.

“7. If material, that it is the opinion of captains, owners and agents that the regulation is unnecessary and arbitrary, and an unjust discrimination against American sailing vessels.”

sion tax has been levied by another State or country which it was within the jurisdictional power of such State or country to levy.

Jurisdiction for the purpose of imposing a succession tax exists only when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the State levying the tax.

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State, such shares have a *situs* both in this Commonwealth, which is the owner's domicile, and in such other State, which is the domicile of the corporation, sufficient to give jurisdictional power to both States to impose a succession tax.

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State and owning property in a third State, such shares are not, under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, "legally subject" to a succession tax in the third State, because that State has no jurisdictional power to levy the tax; and, even if such a tax is levied and paid in such State, there should not be any deduction by reason of such payment from the tax here imposed upon the shares by the provisions of the statute.

If a resident of this Commonwealth at the time of his death owns shares of capital stock in a railroad corporation incorporated in three other States in which it operates its railroad, each of such three other States has jurisdictional power to impose a succession tax upon the shares.

In the absence of something to indicate inequality before the law, inevitable and general disproportion, or oppressiveness or discrimination, a succession tax imposed by another State within its jurisdictional powers upon shares of stock in a corporation there incorporated, is a tax to which the shares there are "legally subject," and its amount cannot be questioned in the computation of the tax to be imposed in this Commonwealth under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2.

In this case in imposing a succession tax upon shares of the capital stock of a railroad corporation incorporated in Michigan, Illinois and Wisconsin, which were owned by a decedent domiciled in Massachusetts at the time of his death, a Probate Court of the State of Michigan computed the tax as though the corporation were incorporated solely in Michigan. The amount of the tax was paid without the matter being adjudicated in any higher court, and this court *held* that, the State of Michigan having jurisdiction to impose a succession tax and it not appearing that the tax was oppressive, irrational or disproportional in law, its amount was not open to question, and therefore it was a succession tax to which the shares were "legally subject" in Michigan and, it having been paid, its amount should be considered in computing the succession tax due in this Commonwealth under St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2.

RUGG, C. J. This is a petition for the refunding of an inheritance tax. The petitioners are administrators of the estate of Eleonora R. Sears, late of Beverly in this Commonwealth. The issue relates to the inheritance tax payable on account of two items of railroad stock, upon which a similar tax has been paid in Michigan. The deceased owned two hundred forty-five shares of stock of the

Chicago and Northwestern Railway Company. That corporation was organized and exists under the laws of the States of Illinois, Wisconsin and Michigan. It has but one capital stock and conducts its business as a single corporation. Seven per cent in value of its total property was situated in the State of Michigan. The deceased also owned one hundred shares of the preferred stock of the Chicago, Milwaukee and St. Paul Railway Company. That corporation was organized and exists solely under the laws of the State of Wisconsin, although it has lines of railroad in that State, in Michigan and in other States. By judicial proceedings in Wisconsin, it was determined that a tax was due to that sovereignty from the estate of the deceased on account of her shares in the Chicago and Northwestern Railway Company, at the rate of one per cent upon fifty-four and six hundred and three thousandths per cent of the value of her holdings of that stock, that being the percentage of the total value of the property of that corporation which is situated in Wisconsin. The State of Wisconsin also collected a tax at the rate of one per cent upon the entire value of her holdings of stock in the Chicago, Milwaukee and St. Paul Railway Company. By judicial proceedings in the State of Michigan, it was determined that a tax was due to that State from the estate of the deceased, on account of her ownership of shares of stock in these two corporations, at the rate of one per cent upon the full value of each of such holdings. These taxes have been paid. Other property of the deceased was subject to an excise succession tax in Michigan, which has been paid and about which no question is made. Subsequently, the tax commissioner of this Commonwealth, in determining the taxes due on account of the stock here in question, deducted from the taxes payable in this Commonwealth the full amount of the taxes paid to the State of Wisconsin. He declined to deduct any part of the taxes paid to the State of Michigan on account of her ownership of stock in the Chicago, Milwaukee and St. Paul Railway Company, and deducted only a part of the taxes paid to Michigan on account of her ownership of shares of stock in the Chicago and Northwestern Railway Company.

The general question, whether the petitioners are entitled to recover in whole or in part, depends upon an interpretation of the controlling section of our tax law. St. 1909, c. 490, Part IV, § 3,

as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2.* The crucial point is to determine the meaning of the words "legally subject in another State or country to a tax" as applicable to property not within the Commonwealth belonging to the estate of a deceased resident and actually taxed in another State. It has been decided by a court of competent jurisdiction, though not by the highest court, in the State of Michigan, that both these holdings of stock were subject to a succession tax in that State, and that the amount which has been paid is the correct amount. It is not contended by the defendant that the laws of Michigan did not authorize the imposition of these taxes. Therefore, it is not necessary to discuss or decide whether this court would be required in interpreting our statute to review at all and, if at all, to what extent it would review the interpretation of the tax statutes of another State given by the courts of that State. But it is urged by the defendant that Michigan had no jurisdiction to impose such taxes and that that question is one which must be determined by Massachusetts tax officers and courts.

The governing words occur in a Massachusetts tax statute, which is the guide for the tax officers of this Commonwealth in the performance of their duties. Whether property is legally subject to a tax in another State is not a question in its essence dependent upon the sole determination of the taxing State. That question often is settled by the Supreme Court of the United States in passing upon contentions arising under the Fourteenth Amendment. The amount of the tax due to this Commonwealth depends upon a correct decision whether the property is subject to taxation in another State or country. The amount of a tax due to any State is one naturally to be decided by the courts of the taxing

* "Property of a resident of the Commonwealth which is not therein at the time of his death, . . . shall not be taxable under the provisions of this part if legally subject in another State or country to a tax of like character and amount to that hereby imposed, and if such tax be actually paid or guaranteed or secured in accordance with law in such other State or country; if legally subject in another State or country to a tax of like character but of less amount than that hereby imposed and such tax be actually paid or guaranteed or secured as aforesaid, such property shall be taxable under this part to the extent of the difference between the tax thus actually paid, guaranteed or secured, and the amount for which such property would otherwise be liable hereunder. . . ."

State. Whether such property legally can be made subject to taxation in another State depends upon general principles of law as to which an authoritative interpretation as between the several States is made by the Supreme Court of the United States.

We are of opinion that the courts of this Commonwealth must decide whether the property of a deceased resident is "legally subject" to taxation in another State or country, in order to decide what tax is due to this Commonwealth. If the Legislature had intended to leave that question to the decision of the courts of other States and countries, it hardly would have used these words. "Legally" well might have been omitted and the word "subjected" substituted for "subject." At all events, these words are not apt to express the thought that our tax officers and courts must stop short with the information that some other State or country has exacted a tax, and make no further inquiry. The statute puts upon them the further duty of ascertaining whether the property which has been thus taxed was in law subject to taxation. Whether property is legally subject to taxation in another State or country depends fundamentally upon the jurisdiction of that other State or country over the property. Jurisdiction as between the several States and as between sovereign nations always is a question which can be inquired into and adjudicated whenever it is pertinent. The declaration in this respect by the authorities of one State, or nation, legislative or judicial, is not binding upon another State or nation. The commonest illustration is when the validity of a judgment rendered by a court of another State is challenged. See *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 205 to 212, (affirmed in *Bigelow v. Old Dominion Copper Mining & Smelting Co.* 225 U. S. 111,) where the cases are collected. There is no inherent difficulty in determining such jurisdiction.

The words used in the instant statute by the Legislature indicate a purpose to surrender the power of this Commonwealth to tax only when a tax within the jurisdictional power of the foreign State or country has been levied, and not when one has been extorted without legal authority. This imposes no hardship on the taxpayer beyond that which always exists when one has to defend himself against a wrong. It is always within the power of a taxpayer to obtain an authoritative determination binding upon

everybody whether he is subject to the jurisdiction of another State of the Union asserting power to tax. Otherwise, in order to avoid double taxation, this Commonwealth might be at the mercy of every other State which asserted a right to tax and possessed the power to compel the payment of the tax. If the taxpayer has not interest enough in securing a final and binding decision as to his liability to a tax in the other State, he ought not to complain if that matter is decided by the courts of his own State. Of course there is no such common arbiter as the United States Supreme Court to settle the question of jurisdiction to tax between a single State and a foreign country. Whether in that case the State with respect to its citizen acts as a complete and unrestrained sovereign need not be inquired now. See *United States v. Bennett*, 232 U. S. 299; *Bemis v. Aldermen of Boston*, 14 Allen, 366. But that question seems likely to arise infrequently.

So far as jurisdiction to tax is concerned, the question whether the property was legally subject to a similar tax in another State is one to be decided by the courts of this Commonwealth if it has not been decided by the Supreme Court of the United States.

Jurisdiction for the purpose of imposing a succession tax exists only when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the State levying the tax. *Walker v. Treasurer & Receiver General*, 221 Mass. 600. *People v. Griffith*, 245 Ill. 532, 537. *Matter of Hull*, 111 App. Div. (N. Y.) 322. *Situs* of the shares of stock within the taxing State is the foundation of jurisdiction to tax. That *situs* ordinarily can be only at the domicile of the owner or at the domicile of the corporation. *In re Enston*, 113 N. Y. 174, 181. *In re James*, 144 N. Y. 6, 10. Doubtless shares of stock have a *situs* sufficient to justify the imposition of a succession tax both at the domicile of the owner of the stock and at the domicile of the corporation. *Moody v. Shaw*, 173 Mass. 375. It commonly has been supposed that the certificate of stock in a corporation can have no independent *situs*, dependent upon its physical location, apart from the domicile of the corporation or of the owner. As a general proposition in the absence of special circumstances, that has been decided in this Commonwealth. *Kennedy v. Hodges*, 215 Mass. 112, 115. *Clark v. Treasurer & Receiver General*, 218 Mass. 292. If, possibly, in some jurisdictions or for some purposes, or by ex-

press statute, it may be where the certificate of stock is physically, *National Safe Deposit Co. v. Illinois*, 232 U. S. 58, *Lockwood v. United States Steel Corp.* 209 N. Y. 375, that does not help in the present case. Where none of these elements are found, there can be no *situs* for purposes of a succession tax. Jurisdiction is a matter of power over the particular *res* or subject. *Lamar v. United States*, 240 U. S. 60, 64. The opportunity to exert mere physical force over other property of the estate of a decedent of course is no warrant for the collection out of it of an alleged tax on property over which it has no taxing jurisdiction.

None of the certificates of stock here in question appear to have been physically in Michigan. Naturally they would be at the domicile of the owner in Massachusetts. The *situs* of intangible personal property follows the person of the owner ordinarily. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51, 57, 60. There is nothing to indicate that the State of Michigan claimed jurisdiction because of the physical presence of the certificates in that State. It did not have jurisdiction over the shares because of the residence of the owner. Confessedly that was in Massachusetts.

These are the general principles according to which the rights of the parties are governed. It remains to apply them to the two kinds of stock. First, as to the shares of stock in the Chicago, Milwaukee and St. Paul Railway Company. That was organized as a corporation solely under the laws of Wisconsin, owing no corporate existence to the laws of Michigan, but simply having some of its tracks and property within the territory of Michigan. Therefore, the State of Michigan had no jurisdiction over the certificates or shares of stock founded on jurisdiction over the corporation itself as its creature, because the corporation was not established under its laws and owed no allegiance to Michigan as its domiciliary State. The State of its domicile is Wisconsin, under whose laws alone it was organized. Therefore, jurisdiction cannot rest on that element as in *Greves v. Shaw*, 173 Mass. 205. The circumstance that there is property of the corporation in Michigan does not confer jurisdiction upon that State to impose a tax on the succession to the shares of stock of the corporation. That property does not in any direct sense belong to the shareholders. The full and complete legal title to it is in the corporation. It is impossible to predicate jurisdiction over non-resident share-

holders in a foreign corporation merely upon the physical presence of property belonging to that corporation within the territory of a State. It is not necessary to discuss whether in any conceivable case subjection to State jurisdiction in this respect might be exacted as a condition for doing domestic business by a foreign corporation within a State, because nothing of that sort appears in the case at bar. The succession to the shares of stock owned by and passing to a resident of Massachusetts in the Wisconsin corporation does not depend in any degree upon the legal or moral support of the laws of Michigan. Hence that State has no jurisdiction to impose a tax upon such succession. The privilege or commodity of passing title to the stock is the thing which is taxed. That requires no sanction of the laws of Michigan for its complete and effective legal transition from ancestor to heir or testator to legatee.

Therefore, we are of opinion that the stock held by the decedent in the Chicago, Milwaukee and St. Paul Railway Company was not subject to the jurisdiction of the State of Michigan for purposes of levying a succession tax.

A different situation exists as to the succession tax on the shares of stock in the Chicago and Northwestern Railway. That corporation was a single corporation so far as concerned its operation, management, stock and profits, but it owed corporate allegiance to each of the States in which it was incorporated. *Attorney General v. New York, New Haven, & Hartford Railroad*, 198 Mass. 413; *Nashua & Lowell Railroad v. Boston & Lowell Railroad*, 136 U. S. 356, and cases cited. It follows that Michigan as one of the incorporating States had jurisdiction over the corporation and could exercise power over the transfer or succession of its stock. That was settled for this Commonwealth by *Kingsbury v. Chapin*, 196 Mass. 533, in a characteristically luminous and convincing opinion by Chief Justice Knowlton. There is no doubt, therefore, of the jurisdiction of Michigan over that corporation for the purpose of imposing a succession tax on the transmission of its shares. The rule enforced by the inferior Michigan court was to collect a succession tax like in amount to that which could have been enforced if the corporation had owed its existence solely to the laws of Michigan. It did not follow the rule laid down in *Kingsbury v. Chapin*, 196 Mass. 533, *Matter of Cooley*, 186 N. Y.

220, (see *Matter of Willmer*, 153 App. Div. (N. Y.) 804, *Matter of Thayer*, 193 N. Y. 430,) *State v. Metz*, 3 Vroom, 199, and *Gardiner v. Carter*, 74 N. H. 507, to the effect that in such cases the value of the stock for purpose of calculating the tax should be based upon the value only of the property in the State levying the tax, and that a tax should be levied only upon such portion of the value of each share as is represented by property of the corporation in the taxing State. That appears to us to be the just and equitable view. It is founded upon the principles of interstate comity to be observed in the interpretation of laws which, unless so construed, may afford ground for conflicting and rival claims between the several States and for just complaint as being oppressive in operation. No other view has been expressed by the Supreme Court of Michigan. But we are bound to accept for the moment the decision of the county probate court, from which no appeal was taken, as expressive of the law of that State.

The question arises whether the principle established by *Kingsbury v. Chapin*, 196 Mass. 533, is one of constitutional and jurisdictional power or simply of comity and justice in taxation between the several States. A succession tax is not a property tax upon the privilege of receiving property by intestate or testate succession. It is in the strict sense an excise tax. It is like a transfer and other excise taxes. It need not be proportional under our Constitution. It is not subject to the restrictions and limitations which attach to property taxes under the Federal Constitution. *Knowlton v. Moore*, 178 U. S. 41. *Blackstone v. Miller*, 188 U. S. 189. *Buck v. Beach*, 206 U. S. 392, 408. Excise or succession taxes may be measured in part at least by the value of property which is exempt from taxation, such as government bonds, merchandise in bond, and other like tax exempt property. *Plummer v. Coler*, 178 U. S. 115. *Commonwealth v. Hamilton Co.* 12 Allen, 298; *S. C. sub nom. Hamilton Co. v. Massachusetts*, 6 Wall. 632. *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156. *Orr v. Gilman*, 183 U. S. 278. Whether property is subject to taxation in another State or country depends upon jurisdiction. If property is subject to the jurisdiction of another taxing sovereignty, the amount of the tax which can be collected ordinarily is a matter for the decision of that sovereignty. It must be assumed because no attack is made in these respects upon the

Michigan succession law that, it operates equally upon all shareholders similarly situated and upon all corporations owing a like corporate allegiance and that it makes no discrimination against some in favor of others. In the absence of something to indicate inequality before the law, inevitable and general disproportion, or oppressiveness or discrimination, the amount of any particular tax is not open to inquiry in another jurisdiction. See *Gast Realty & Investment Co. v. Schneider Granite Co.* 240 U. S. 55.

It seems to follow that no provision of the Federal Constitution is violated by a State law which establishes a flat and unvarying percentage of value as the tax upon the privilege of transferring every certificate of stock under the sanction of its laws applicable alike to corporations incorporated alone under its laws and to corporations owing a corporate allegiance to several States. Some gauge by which to measure the tax must be adopted. Doubtless the same amount might be levied on all transfers, as in stamp taxes. To impose the tax in proportion to the value of the stock has more elements of fairness. *Keeney v. New York*, 222 U. S. 525, 534. Since this is an excise tax, the objection that it is measured in part by the value of property outside the State, which would be fatal to the validity of a property tax, *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, does not prevail. Property which is not taxable as such may be considered under the Constitution in fixing the amount of an excise tax. *Plummer v. Coler*, 178 U. S. 115. A kindred principle permits an excise tax upon the privilege of doing domestic business within the State by a foreign corporation, to be measured by the entire capital stock of such foreign corporation. *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381; *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35; both affirmed in 231 U. S. 68. See *Dwight v. Mayor & Aldermen of Boston*, 12 Allen, 316; *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51.

The conclusion is that the tax levied by Michigan on the Chicago and Northwestern Railway Company stock, although in conflict with the principles established by *Kingsbury v. Chapin*, 196 Mass. 533, and contrary to what we believe to be the closest reasonable approximation to fairness, does not infringe any provision of the Federal Constitution or exceed the jurisdictional power of that State. It is not contrary to common right. It is not deprivation

of property without due process of law. The State of Michigan had jurisdiction to levy a succession tax. The tax actually levied cannot be said to be oppressive, irrational or disproportionate in law, and therefore must stand. That stock was "legally subject," in the sense in which those words are used in our statute, to the tax levied in Michigan. Hence, its entire amount without diminution should have been considered in determining the succession tax due to Massachusetts.

The decree of the Probate Court * is amended by striking out so much as adjudges, that the tax assessed on the stock of the Chicago, Milwaukee and St. Paul Railway Company was wrongly assessed, by making other appropriate modifications rendered necessary thereby, and as thus amended is affirmed.

So ordered.

B. Corneau, for the plaintiff.

W. H. Hitchcock, Assistant Attorney General, for the defendant.

FRANCIS D. CORKERY & another vs. MARY L. DORSEY & another.

Suffolk. November 5, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, BRALEY, & CROSBY, JJ.

Equity Pleading and Practice, Memorandum of findings, Appeal, Parties, Costs. Trust, Construction, Spendthrift.

A memorandum of findings of fact, filed by a single justice of this court by whom a suit in equity was heard, is a part of the record of the case on appeal and is entitled to all the weight of a finding made under R. L. c. 159, § 23.

Under a trust instrument conveying the sum of \$2,000 to a trustee with directions to pay over to a certain woman, when in the trustee's judgment she "is deserving and in need of aid," whatever part of the fund the trustee may deem for her best

* The decree of the Probate Court of Essex County was "that the tax assessed upon the stock of the Chicago & North Western Railway Company to the amount of \$172.22 and the tax assessed upon the stock of the Chicago, Milwaukee & St. Paul Railway Company in the amount of \$133.00 were wrongly assessed and said taxes amounting in all to \$305.22 are hereby abated and the respondent is ordered to pay to the petitioners said amount of \$305.22 with interest from January 13, 1915." The Treasurer and Receiver General appealed, and the case was reserved by *Braley, J.*, for determination by the full court.

interests, in such sums and at such times as the trustee may deem expedient or necessary, with a power given to the beneficiary to dispose by her will of whatever remains of the fund at her death, the trustee is required to exercise prudence and reasonableness in making payments to the beneficiary and should make such payments as a protection against her necessities, and he should not act upon caprice or careless good nature, much less from a desire to be relieved from trouble and the possibility of making a foolish investment.

If the trustee under the above described instrument, within three years after the trust was established, when the beneficiary had become engaged to be married to one who was an estimable man in every way, without any request by the beneficiary but merely because he considered her "deserving" and the "sole owner" of the fund, pays over to the beneficiary the entire balance of the fund remaining in his hands amounting to about \$1,939, such conduct cannot be considered an exercise of sound discretion on his part, and, on a bill in equity by one interested as a beneficiary on the death of the life beneficiary without disposing of the fund by her will, the life beneficiary will be compelled to repay to the trustee so much of the fund as was not needed for her immediate necessities.

One, to whom any unexpended balance of a spendthrift trust fund might be paid at the death of a life beneficiary in case she had not disposed of it by her will according to a power given to her by the trust instrument, has a right, in no way depending upon the discretion of the court, to maintain a suit in equity to set aside an improper payment of the fund by the trustee to the life beneficiary irrespective of what motives actuate him in the institution of the suit.

In this case, because of improper motives which actuated the plaintiff, he was not awarded costs.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 15, 1912, by Francis D. and Henry F. Corkery against Mary Louise Dorsey, formerly Fay, and Cornelius O'Callaghan, seeking to compel the defendant Dorsey to repay to the defendant O'Callaghan a sum of money, formerly held in trust by O'Callaghan under a trust deed to which the plaintiffs and the defendants had assented in writing, and paid by the defendant O'Callaghan to the defendant Dorsey in alleged violation of the provisions of the trust instrument.

The first clause of the trust instrument is quoted in the opinion. The second clause provided in substance that if Mary Louise Fay did not dispose of the trust fund by her will, and Francis D. Corkery, one of the plaintiffs, was living at her death, the trustee should hold the fund as a spendthrift trust for his benefit; and the third clause provided that, if there was no testamentary disposition of the fund by Mary Louise Fay and Francis D. Corkery was not living at her death, the residue of the fund should be paid to the children of Mary Louise Fay, if she left any; otherwise to such heirs of Francis D. Corkery as were his "blood rela-

tives." The plaintiff Henry F. Corkery was a brother of Francis D. Corkery.

The suit was heard by *De Courcy, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. The material evidence is described in the opinion. The single justice filed the following memorandum:

"The trust agreement in question is made a part of these findings.

"The trustee, Cornelius O'Callaghan, has paid from the trust fund to the beneficiary, Mary Louise Dorsey (whose name before marriage was Minnie Fay), the following amounts: June 16, 1910, \$57; April 12, 1911, \$100; June 8, 1911 (the balance), \$2090. Mrs. Dorsey still has unexpended \$1360 of this last sum.

"The only complaint made by the plaintiff at the hearing was with reference to the last payment; and of this he seeks the repayment to the trustee of only the \$1360 now in the hands of Mrs. Dorsey, as he concedes that the portion expended by her should have been paid to her by the trustee if the fund had remained in his hands.

"The trustee had known the beneficiary well for twenty years, and was familiar with her habits and her wants; and he made the last payment without being solicited to do so by her or by Mr. Dorsey. On all the evidence I find that, acting in good faith and in the exercise of his honest judgment, Mr. O'Callaghan thought, at the time of the payment, that Miss Fay was 'deserving and in need of aid,' in view of the condition of her health, her unemployment, and her approaching marriage.

"Even if the fund had remained in, or should be restored to, the hands of the trustee, the beneficiary has power to dispose by will of any portion thereof that may not be used by her. The bill in equity is prosecuted by Henry F. Corkery, and I find that he is induced to do so by his ill will against Mr. Dorsey, rather than by a desire to protect his remote contingent interest in the money, or the contingent interest of his brother, who did not appear. For these reasons I should decline to grant the prayers of the plaintiff in any event, so far as the granting of them is dependent on my discretionary power."

A final decree was entered dismissing the bill without costs. The plaintiffs appealed.

F. G. Bauer, (J. M. Fowler with him,) for the plaintiffs.

C. M. Davenport, for the defendants.

RUGG. C. J. This is a suit in equity, whereby the plaintiffs, interested in a trust fund, seek in substance for a revision of the discretion exercised by the trustee in paying over the entire corpus to one beneficiary. The decision turns upon the meaning of this clause in the trust instrument: "First. To pay over to Mary Louise Fay of said Boston when in the judgment of said O'Callaghan the said Fay is deserving and in need of aid, whatever part of said two thousand dollars (\$2000.) or its earnings that said O'Callaghan may deem for the best interests of said Mary Louise Fay, in such sums and at such times as he may deem expedient or necessary, but said sum of two thousand dollars (\$2000.) or any part thereof or its earnings shall not be subject to the control or interference of the creditors of said Fay, nor alienable by her save that she shall have the right to dispose at her death by any testamentary document, of whatever part of said two thousand dollars (\$2000.) and its earnings as may be left at the time of her death." Other clauses provide for further trusts on the death of Mary Louise Fay and for the ultimate distribution of the fund. The case was heard by a single justice, who made this finding: "The trustee had known the beneficiary well for twenty years, and was familiar with her habits and her wants; and he made the last payment without being solicited to do so by her or by Mr. Dorsey. On all the evidence I find that, acting in good faith and in the exercise of his honest judgment, Mr. O'Callaghan thought, at the time of the payment, that Miss Fay was 'deserving and in need of aid,' in view of the condition of her health, her unemployment, and her approaching marriage." A decree was entered dismissing the bill, and the plaintiffs' appeal brings the case before us with a full report of the evidence.

This finding of fact, although filed without request, is a part of the record and is entitled to all the weight of a finding made under R. L. c. 159, § 23. *Cohen v. Nagle*, 190 Mass. 4. The familiar rule in such cases is that it is the duty of this court to examine the evidence with care and to decide the case according to its judgment, giving due weight to the finding of the judge. His decision will not be reversed unless plainly wrong, when it depends upon oral evidence of witnesses who testified in person before him. *Goodell*

v. *Goodell*, 173 Mass. 140, 146. *Lindsey v. Bird*, 193 Mass. 200. *Sawyer v. Clark*, 214 Mass. 124, 126.

A careful study of the evidence does not convince us that the finding of fact was erroneous. The trustee doubtless exercised his honest judgment in good faith in reaching the conclusion in his own mind that Miss Fay was "deserving and in need of aid."

That fact, however, is not decisive. The power conferred upon the trustee was the exercise of reasonably sound judgment. No arbitrary or capricious power was conferred even though honestly exercised. A trustee vested with discretionary power to distribute a fund in whole or in part is bound to use reasonable prudence. The possession of full power or wide discretion by a trustee means the kind of power and discretion which inheres in a fiduciary relation and not that illimitable potentiality which an unrestrained individual possesses respecting his own property. There is an implication, when even broad powers are conferred, that they are to be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature, much less a desire on the part of the trustee to be relieved from trouble or from the possibility of making a foolish investment, furnish the standard of conduct. *Davis, appellant*, 183 Mass. 499. *Amory v. Green*, 13 Allen, 413, 416. *Garvey v. Garvey*, 150 Mass. 185, 187. *Wilson v. Wilson*, 145 Mass. 490, 492. *Colton v. Colton*, 127 U. S. 300, 320, 321. Doubtless a trust might be created which by its terms would make the judgment of the trustee, however unwise it might be, the final test. *Leverett v. Barnwell*, 214 Mass. 105. *Gisborne v. Gisborne*, 2 App. Cas. 300. But the present instrument does not confer an uncontrolled and absolute discretion.

The conduct of the trustee must be tested by these principles. In view of the finding of the single justice, the real question is whether the trustee failed to exercise sound discretion. *Taft v. Smith*, 186 Mass. 31. The money which formed the *corpus* of this trust was accumulated by the savings from a small store by the sister of the plaintiffs. In her family for some fifteen years had lived Miss Fay, for whose benefit this spendthrift trust was established. She was a worthy and industrious young woman, without substantial financial resources, who supported herself by work in a store. The amount of the fund was \$2,000. It was established

in December, 1908. Small amounts had been paid to her when ill or for other purposes, about which no question rightly can be made. Then she became engaged to be married, although the time for the wedding was not set and she was not married for nearly a year after the money was paid. The man to whom she was engaged and later married, appears to have been an estimable man in every way. Under these circumstances and without any request from her, the trustee, in June, 1911, less than three years after the trust was established, paid the entire balance of the trust fund, amounting to about \$1,939, to Miss Fay. The trustee testified that she asked him for some money and he replied: "Now you better take it all. . . . I thought she was conducting herself like a good girl and I could give it to her. . . . She could take better care of it than I could, and it was not bringing any interest in the Commonwealth Trust . . .; that if she put it in a savings bank, she could get more interest; and I was intending to go to Ireland, and I did not know what might happen, and I thought it was in safe hands to give it to herself. . . . I thought I gave it to the sole owner." Other testimony shows that the trustee thought highly of the man to whom she was to be married, and was influenced by the fact that she had the power of testamentary disposition. But giving full weight to all these factors, it was not within the scope of the trust to terminate it in this way. The trustee was authorized to pay money to her when she "is deserving and in need of aid." These words must be read and interpreted in connection with the whole frame of the trust. Here was a sum of money sufficient to help a young woman over many a rough place if carefully conserved, but not enough to do much toward relieving her from work if she was in health. A spendthrift trust was created so that she would be protected from her own improvidence. The manifest purpose of the settlors was that it should be held as a protection against her necessities, and administered thus for her benefit as a wise father might hold and pay it to her in comparatively small amounts at least for a considerable time. It was not a due execution of the trust to pay it all over within less than three years after the trust was established. At the time of payment to her, the young woman was "deserving." But that was only one of the conditions on which it could be paid to her. She was required to be also "in need of aid." In view of her impending

marriage, she was doubtless in need of some money to procure whatever was appropriate for that event in the way of furniture and otherwise. But she did not need the whole. That is shown, if other proof were needed, by the circumstance that over \$1,300 was left a considerable time after the marriage. No pretence is made by the honest family friend who was trustee that she did need the money in the sense of requiring it then for her necessities or comforts. He simply acted under a mistake as to his duty, which was to invest it safely and conservatively, in a savings bank or other equally well recognized way, and hold it not necessarily forever, but for a reasonable period of time, as against her rational needs.

It follows that, upon the facts found, a true interpretation of the declaration of trust did not warrant paying the entire body of the fund to Miss Fay. Such payment to her was a perversion of the trust.

The defendants make no question as to the right of the plaintiffs to maintain the bill. Their right in the fund as remaindermen was vested. *Clarke v. Fay*, 205 Mass. 228. They have done nothing to prevent themselves from exercising their rights. There is therefore no room for the exercise of discretion in granting some relief, and their motives in instituting the bill are immaterial. *Dickerman v. Northern Trust Co.* 176 U. S. 181, 190. *Bloxam v. Metropolitan Railway*, L. R. 3 Ch. 337, 353. *Seaton v. Grant*, L. R. 2 Ch. 459, 464. *Davis v. Flagg*, 8 Stew. 491. *Clinton v. Myers*, 46 N. Y. 511, 520. See *Randall v. Hazelton*, 12 Allen, 412, 418. But on this account the plaintiffs are not to be awarded costs.

According to the agreement of the parties, the amount for which the defendants are to account is \$1,000. The decree dismissing the bill is reversed. A new decree is to be entered, directing that \$1,000 to be repaid by Mrs. Dorsey, formerly Miss Fay, to the trustee, to be held by him in accordance with the terms of the trust, without costs to the plaintiffs.

So ordered.

BENJAMIN KAUFMAN vs. PHILIP KAUFMAN & another.

Worcester. November 8, 1915. — March 1, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Unfair Competition. Trade Name. Evidence, Inference, Presumptions and burden of proof.

The mere use by a retail dealer in a certain business territory of a trade name, which another dealer has found highly effective in bringing his goods to the favorable attention of the public in another business territory, constitutes no actionable wrong.

A suit in equity to enjoin the use of a retail trade name and symbols of the plaintiff cannot be maintained where it does not appear that the territory in which the defendant used the trade name and symbols was one to which the plaintiff's trade extended.

From the facts that a retail dealer in hats, widely advertised under a trade name and a symbol and as sold for \$1.50, first opened a store in New York City in 1900 and now has forty-one stores in nine different States, including twenty-four in Greater New York, one in Providence and two in Boston, it cannot be inferred that a market for his hats, sufficient to give him the exclusive right to the use therein of his trade name and symbols, reaches to Worcester, in this State, or to Woonsocket in Rhode Island or to New Haven in Connecticut, in the absence of any evidence that he did any advertising in those cities or that any of his hats ever were sold there.

RUGG, C. J. This is a suit in the Superior Court to restrain the defendants from simulating the plaintiff's trade name and from imitating the general appearance of the plaintiff's stores. The case was sent to a master, whose report shows the material facts in substance as follows: The plaintiff is a seller at retail of men's hats, who opened his first store in New York in 1900, and who now has forty-one stores in nine different States, including twenty-four in New York and Brooklyn, one in Providence opened in 1908, and two in Boston opened in 1910. He is not a manufacturer, but has hats made on his orders as to quality and style. The plaintiff advertised so extensively and in such manner and combination that the "name 'Kaufman' in the way the plaintiff used it in his several stores, considering the style of lettering (back-hand script) with the use of the figures \$1.50 and of the words 'The hats they talk about,' became so associated and identified with the plaintiff's business as to acquire a secondary meaning, and that when

so used it came to mean one of the plaintiff's stores." In other words, he had acquired a trade name in connection with his hat business.

The defendants opened a retail hat store in Worcester in 1909, and in New Haven and Woonsocket in 1914. In the conduct of their business in each of these cities, the defendants simulated the plaintiff's trade name by conduct begun in Worcester, not when the store was first opened, but about two years after the plaintiff opened his Boston stores. The master recognizes the difficult question to be whether the plaintiff had acquired any "market" in the cities where the defendants maintained their stores, and in no one of which the plaintiff has or has had a store, and in that connection reports: "There was no direct evidence as to the plaintiff's market for his several stores. The business was entirely retail and the territory covered by his trade was presumably much less in extent than in the case of such a business as was carried on in *Cohen v. Nagle*, 190 Mass. 4." There was no evidence that the plaintiff ever advertised in Worcester, Woonsocket or New Haven, that a hat was ever sold to a person living in Worcester from any of the plaintiff's stores, that any person living in Worcester ever heard or knew of the plaintiff's Boston stores, or as to the volume of business done at either of the plaintiff's Boston stores.

The master's finding in view of these facts is this: "I find as a fact (if such finding is justified from the other facts found) that Worcester became a part of the plaintiff's natural market after the establishment of the Boston stores, and that after the defendant Philip changed his signs, they so closely resembled the plaintiff's signs as to be calculated to mislead the Worcester public into believing that the Worcester store was one of the plaintiff's stores, and that thereby the plaintiff was likely to be deprived of a part of his trade. I also find as facts (if such finding is justified from the other facts found) that Woonsocket, which is sixteen miles from Providence, was a part of the natural market of the Providence store, and that New Haven, which is seventy-three miles from New York, was a part of the natural market of the twenty-four New York and Brooklyn stores, and that the plaintiff's trade name was established in Woonsocket and New Haven before the defendants opened their stores there, and that the de-

defendants' signs so closely resembled the plaintiff's trade name that the public were likely to be misled into believing that the defendants' stores were stores conducted by the plaintiff, and that the plaintiff was thus likely to be deprived of trade which fairly belonged to him." *

It was decided in *C. A. Briggs Co. v. National Wafer Co.* 215 Mass. 100, after ample review of the authorities and a full discussion of principles, that where a plaintiff has established a trade name which is not strictly a trade mark, as indicating that goods bearing it are put upon the market by him, he is entitled to protection against unfair competition in its use by others only within the territorial boundaries where he has established his trade name by actual commercial transactions, and not outside that territory. As was said by Mr. Justice Sheldon at pages 106, 107, the vendor who has built up a trade name by the use of particular words, "has a right to be protected in selling his goods against the unfair competition of any others who may seek by imitating his brands . . . to palm off their goods as his. . . . Where the words have not gained that meaning, no rights of the plaintiff are infringed by the defendant's use of them. The defendant has the right to imitate . . . where this involves no . . . attempt to get the benefit of the public's desire to have goods [from the plaintiff]. . . . The gist of the action is not the harmless use of the particular words and symbols, but the appropriation of the plaintiff's business." This is the statement of the law which governs the case at bar. *Holbrook v. Nesbitt*, 163 Mass. 120. *Hanover Star Milling Co. v. Allen & Wheeler Co.* 125 C. C. A. 515. *Munn & Co. v. Americana Co.* 3 Buch. 309.

The plaintiff is entitled to relief only on the ground of unfair trade competition or interference with his established rights. The trade name and symbols of the plaintiff cannot extend into regions where his goods are not sold, where he has no customers, and where he has no trade. There can be no recovery unless it appears that there has been a wrongful appropriation by the defendants of trade which belonged to the plaintiff. The mere use of a trade name which one person has found highly effective in bringing his goods to the

* By order of *Sanderson, J.*, exceptions of the defendants to the master's report were overruled, the report was confirmed, and a final decree granting the prayers of the bill was entered. The defendants appealed.

favorable attention of the public in one business territory, by another person in another business territory, constitutes no actionable wrong. Actual or probable deception of the public to the harm of the plaintiff is the basis of the action. There can be no unfair competition unless the plaintiff is in fact a rival for the trade which the defendants secure.

The master having found expressly that there was no evidence as to the area from which the plaintiff drew his custom for his several stores, the bald question presented is whether it can be inferred without evidence that two retail hat stores in Boston draw trade from Worcester, twenty-four such stores in New York and Brooklyn, from New Haven in the State of Connecticut, and one in Providence, from Woonsocket, both in the State of Rhode Island, the distance between these several cities being forty-five, seventy-three and sixteen miles respectively.

There is nothing remarkable or peculiar about stores for sale at retail of men's hats. As matter of common knowledge it must be presumed that there are numerous such stores in each of the cities where the defendants do business. Men's hats are ordinary articles of trade of universal use. Those of the plaintiff are all of the uniform price of \$1.50. Manifestly the territory from which a retail store draws its custom must be much more restricted than that of a wholesale store or manufactory. Where there is concerned but a single article of men's apparel, of which usually there are not many in use by one person during the same period, of a price not exceeding \$1.50, the trade territory of a store or stores in a single city would not as matter of common knowledge extend into other cities.

Doubtless it is not necessary to show, in a case of unfair competition, that particular customers have been diverted, in order that a plaintiff may recover. It is enough if the infringer operates in the territory from which the owner of the trade name draws his patronage. But there must be some evidence to show the facts before it can be inferred that every retail haberdasher's store has a trade circle with a radius of seventy-three miles. It does not seem easy to infer that men would travel from sixteen to seventy-three miles from cities like Woonsocket, Worcester and New Haven to spend \$1.50 for a hat.

It was held in *C. A Briggs Co. v. National Wafer Co.* 215 Mass.

100, that, although the plaintiff's trade name and commercial territory as to a wholesale selling of confections, comprehended numerous States including Ohio, Michigan, Virginia and West Virginia, it could not be presumed or inferred that use of that trade name by the defendant in the adjoining States of Illinois, Indiana, Tennessee and Kentucky and other neighboring States, was unfair competition, or that the defendant's goods were there palmed off as the goods of the plaintiff, when there was no evidence that the plaintiff's business in fact was carried on in those States. The inference without evidence that retail trade in men's hats extends so far away from the plaintiff's stores into other cities well known as commercial centres, as in the case at bar, seems quite as unwarrantable as the inference held unjustified in the Briggs Company case. *Eastern Outfitting Co. v. Markheim*, 59 Wash. 428. The case at bar is plainly distinguishable from *Samuels v. Spitzer*, 177 Mass. 226, where there was explicit evidence that the trade territory of the plaintiff's business house, although located in Rhode Island, extended into southeastern Massachusetts. No argument has been addressed to us that any distinction is to be made between the stores of the defendants in Woonsocket, Worcester and New Haven, as to the inferences to be drawn as to their unfair competition. There seems no reason on this record for making any difference between them. It follows that the facts found by the master did not justify the ultimate fact found of unfair competition by the defendants with the business of the plaintiff.

Decree reversed.

Decree to be entered dismissing bill.

The case was submitted on briefs.

L. E. Feingold & J. F. Humes, for the defendants.

C. H. Derby, for the plaintiff.

ARTEMUS B. LEE & others vs. CITY OF LYNN & others.

Essex. November 19, 1915. — March 1, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Constitutional Law. Labor. Civil Service. Statute, Construction. Words,
"Public works."

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, that "in the construction of public works by the Commonwealth, or by a county, city or town" and "In all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference," do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. Following *Heim v. McCall*, 239 U. S. 175; *Crane v. New York*, 239 U. S. 195.

Nor are the provisions of the statutes mentioned above in conflict with the Constitution of this Commonwealth.

The provisions contained in St. 1914, c. 600, §§ 2, 3, that "The civil service commission shall not place upon its lists any person not a citizen of the United States," and that "If an appointing officer, because of the non-existence of a list of eligible appointees, appoints under provisional authority from the civil service commission a person not a citizen of the United States, he shall discharge the person so appointed and appoint from the eligible list whenever the civil service commission establishes a list of the proper class," are constitutional and valid.

Section 1 of St. 1914, c. 600, which provides that "In all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference," is in no way confined in its application, by the subsequent sections of the statute referring to the civil service, to those cities and towns where the classified civil service prevails under the civil service law.

Whether the statutes mentioned above require the discharge of faithful and efficient aliens in service at the time of their enactment or *whether* they relate only to the future, it was not necessary to determine in the present case.

BILL IN EQUITY, filed in the Superior Court on July 16, 1915, under R. L. c. 25, § 100, by more than ten taxable inhabitants of the city of Lynn, including persons alleged to be of Russian, British and Italian citizenship, praying for an injunction restraining the defendant city and its officers and agents from taking any action under St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, § 1, and St. 1914, c. 600, and from discharging mechanics and laborers on the ground that they are not citizens of the Commonwealth and employing

citizens of the Commonwealth in preference to them in obedience to those statutes.

The defendants demurred to the bill, and the case was heard on the demurrer by *McLaughlin*, J., who ruled that the demurrer should be sustained and made an interlocutory decree to that effect, but, being of opinion that the order so affected the merits of the controversy that before further proceedings the matter ought to be determined by this court, reported the case for such determination. If the ruling was right, a decree was to be entered dismissing the bill, unless justice required that the plaintiffs should be permitted to amend their bill. If the ruling was wrong, the demurrer was to be overruled.

St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, is as follows:

"In the employment of mechanics and laborers in the construction of public works by the Commonwealth, or by a county, city or town, or by persons contracting therewith, preference shall be given to citizens of the Commonwealth, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such works shall contain a provision to this effect. The wages for a day's work paid to mechanics employed in such construction of public works shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality, city or town where such public works are constructed. Any contractor who knowingly and wilfully violates the provisions of this section shall be punished by a fine of not more than one hundred dollars for each offence."

St. 1914, c. 600, is as follows:

"Section 1. In all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference.

"Section 2. The civil service commission shall not place upon its lists any person not a citizen of the United States.

"Section 3. If an appointing officer, because of the non-existence of a list of eligible appointees, appoints under provisional authority from the civil service commission a person not a citizen of the United States, he shall discharge the person so appointed and appoint from the eligible list whenever the civil service commission establishes a list of the proper class.

"Section 4. Whenever the attention of the civil service commission shall be called by complaint on the part of any citizen of the Commonwealth to the employment of a non-citizen when there is a list of eligibles existing, the commission shall take steps to enforce the dismissal of such non-citizen and the appointment in his place from the suitable eligible list.

"Section 5. Whenever it shall appear that any appointing officer has had due notice of unlawful employment of a non-citizen and that the said appointing officer has continued such employment for ten days after such notice, he shall be subject to a fine of not less than ten nor more than one hundred dollars for each offence.

"Section 6. This act shall take effect upon its passage."

The case was submitted on briefs.

J. E. Macy & J. F. Moloney, for the plaintiffs.

E. F. Wallace, for the State Board of Labor and Industries.

RUGG, C. J. The constitutionality of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, are assailed in this suit as contravening the rights secured both by the Fourteenth Amendment to the Federal Constitution and by art. 12 of the Declaration of Rights.

In substance, these acts require that "in the employment of mechanics and laborers in the construction of public works by the Commonwealth, any county, city or town, or by persons contracting therewith, preference shall be given to citizens of the Commonwealth;" and that, "in all work of any branch of the service of the Commonwealth, or of any city or town," a like preference shall be given.

Since the argument of the case at bar, the federal questions involved have been decided adversely to the contentions of the plaintiff. *Heim v. McCall*, 239 U. S. 175. *Crane v. New York*, 239 U. S. 195, affirming *People v. Crane*, 214 N. Y. 154. *Elkan v. Maryland*, 239 U. S. 634. By these decisions statutes of other States, indistinguishable so far as concerns their constitutionality in any material particular from those here attacked, have been upheld as not violative of any right protected by the Federal Constitution or secured by treaty of the United States with Italy and by other treaties containing "the most favored nation clause." On the authority of these cases, it must be held without further discussion

that the instant statutes are not inconsistent with the Federal Constitution and treaties.

While the provisions of our Constitution are not in the same words as those of the United States Constitution upon this subject, the result must be reached that these statutes are not in conflict with the State Constitution. The decision upon this point is concluded in principle by *Woods v. Woburn*, 220 Mass. 416, following the reasoning and conclusion set forth in *Opinion of the Justices*, 208 Mass. 619, where the power of the Legislature was upheld to fix the number of hours which shall constitute a day's labor for employees of the Commonwealth and its governmental subdivisions, and by the reasoning of the decisions of the United States Supreme Court just cited. The cities and towns of the Commonwealth are divisions of government established in the public interests. The Legislature is supreme in the control of these governmental instrumentalities, subject to the provisions of the Constitution. In its representative capacity, within appropriate functions of legislation, the General Court stands in the position of employer. It may establish general rules for the employment of labor. Since it is a public agency directing the expenditure of money raised by taxation, it cannot make arbitrary discriminations and favor the employment of one class of citizens to the exclusion of others. But a preference of citizens over aliens in the public service is not favoritism among the subjects of the Commonwealth. Aliens are not members of the State in the strict sense. Statutory discriminations in favor of citizens and against aliens have been upheld. In *Commonwealth v. Hilton*, 174 Mass. 29, regulations restricting to inhabitants the right to take clams were sustained, and in *Commonwealth v. Hana*, 195 Mass. 262, a requirement that licenses to pedlers should be granted only to those who had declared an intention to become citizens was held to be valid. Where the State, either directly or through its governmental departments, acts as proprietor or employer, a determination not to engage aliens in its service cannot be pronounced unreasonable or violative of any constitutional mandate.

The distinction between laws passed by the Legislature regulating the conduct of the State and its departments and subdivisions as employer, which are within its right, and similar laws designed to control the conduct of the general public, is adverted to in *Truax v. Raich*, 239 U. S. 33. A law of the latter class there was

held to fall under the condemnation of the fundamental law. But the present statutes belong plainly to the former class.

It cannot be said that these statutes are void for indefiniteness or vagueness. Preference to citizens over aliens in employment in its ordinary sense means that, where other considerations are equal, the opportunity for employment shall go to the citizens.

The provisions of St. 1914, c. 600, §§ 2-4, in relation to the civil service, appear to be too plain to require general discussion.

"Public works," as used in St. 1914, c. 474, are not words so uncertain in significance as to affect the validity of the statute. Doubtless in the ordinary case there would be little difficulty in determining their meaning. Manifestly, in this connection water works are public works. See *Milford Water Co. v. Hopkinton*, 192 Mass. 491.

There is no force in the contention that St. 1914, c. 600, applies only to cities and towns where the classified civil service prevails under the civil service law. Section one of the act is not thus constricted by subsequent sections.

It is not necessary to determine whether the present statutes are so retroactive as to require the discharge of faithful and efficient aliens in service at the time of their enactment, or whether they relate only to the future, see *Hanscom v. Malden & Melrose Gas Light Co.* 220 Mass. 1; for the plaintiffs on the allegations of the bill do not show themselves entitled to relief. *Steele v. Municipal Signal Co.* 160 Mass. 36. *Sylvester v. Webb*, 179 Mass. 236, 241.

Bill dismissed without costs.

JESSE F. PADDLEFORD vs. LANE AND COMPANY, INCORPORATED.

Suffolk. November 30, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Sale, Vendee's right of inspection. *Bill of Lading*. Carrier, Of goods. *Practice*, Civil, Judge's charge, Requests and instructions. *Evidence*, Foreign law.

If a dealer in the State of New York consigns cabbages, which he has sold to a merchant in Boston, to himself in Boston with directions to the carrier to

"notify" the Boston merchant, indorses the bill of lading in blank, attaches it to a draft upon the Boston merchant for the purchase money and transfers both the bill of lading and the draft through a local bank to a Boston bank for collection, the Boston merchant is a stranger to the shipment and, until he has paid the draft and has become an indorsee of the bill of lading, he has no right to inspect the cabbages and the carrier has no right to permit him to do so.

If, at the trial of an action of contract for the purchase price of cabbages sold by the plaintiff in the State of New York to the defendant in Boston, there is evidence that a condition of the sale was that the defendant should have a right to inspect the cabbages after their arrival in Boston before he should become liable for the purchase price, and it appears that the method of shipment adopted by the plaintiff gave the defendant no right to inspect and the carrier no right to permit an inspection until the defendant had paid a draft drawn upon him for the purchase price, and that before inspection by the defendant was permitted the cabbages had so deteriorated that the defendant refused to accept them, the presiding judge should charge the jury that, if they found that by the contract of sale the defendant was given the right to inspect, the defendant's refusal of the cabbages under the circumstances was justified, and it is improper for the presiding judge in his charge to make such justification conditional upon the defendant having seasonably asked the plaintiff for permission to inspect.

The foregoing rule of law is the same, whether the right of inspection in the vendee was a condition precedent to the passing of the property to the vendee or was a condition subsequent enabling the defendant to rescind the sale if on inspection the cabbages were found not to be what the contract called for.

Where, at a trial before a jury, the law of another State is an issue and a part of the evidence introduced upon the subject consists of a report of a decision of the highest law court of such State, it is improper for the presiding judge to instruct the jury as to what is the rule of law established by that decision. The meaning of the decision is a question of fact to be determined by the jury.

At the trial of an action of contract for the purchase price of cabbages, the judge in his charge described the contract as one for a sale of "Danish cabbage." It appeared that on a certain day the plaintiff offered by letter to sell to the defendant "fine stock" cabbages, that on the next day by telegram he offered to sell "Danish cabbage," and that the defendant telegraphed, "Letter received ship . . . cabbage offered." *Held*, that the contract between the parties was for a sale of "fine stock" cabbages and came within the rules of law applicable to contracts for the sale of goods of "a specific quality," and that the judge made a material error in his charge.

LORING, J. The plaintiff, living in Sherburne, New York, offered to sell to the defendant, doing business in Boston, two carloads of "fine stock" cabbages at \$10 a ton, and the offer was accepted by the defendant. The cabbages were shipped at Sherburne on March 31 and April 1. They arrived in Boston on April 5. They were inspected by the defendant on April 20. They were then in a poor condition, the defendant refused to accept them, and they were sold by the railroad company to pay its charges. They brought \$51.95. Its charges were \$127.17. The balance, amount-

ing to \$75.22, was then paid by the plaintiff, and this action was brought against the defendant to recover the price of the cabbages and the balance of freight charges paid by the plaintiff.*

There was a conflict between the stories told by the plaintiff and the defendant as to what transpired between April 5, when the cars arrived in Boston, and April 20, when they were inspected. The plaintiff's story was that after the shipment of the cabbages he heard nothing about them until April 15; that what he heard on April 15 he heard not from the defendant but from the agent of the railroad at Sherburne; that on that day the agent of the railroad at Sherburne told him (the plaintiff) that he (the railroad agent at Sherburne) had received a telegram from the Boston and Maine Railroad at Boston, dated April 13, to the effect that the defendant had asked for inspection of the cabbages and refused to take the cars because inspection was not allowed; that on receiving this notice from the agent of the railroad at Sherburne he telegraphed to the defendant that the Boston and Maine Railroad agent "reports last two cars cabbage shipped you refused. Is this the case, and, if so, for what reason answer quick;" and that he received from the defendant in answer to this telegram a message which we interpret to be that the bill of lading of neither car allowed inspection, and that the railroad required the defendant to get permission from the plaintiff before they would allow the defendant to make an inspection. The defendant's story (told through its president) was that under the bill of lading under which the cabbages had been shipped he had no right to inspect them and that he so telegraphed the plaintiff on April 6; to this he got no answer; that he again telegraphed the plaintiff on April 11, asking the plaintiff to "Wire railroad allow us inspection of cars cabbage;" that the first notice he received allowing him to inspect them was on April 20; that he inspected them on the same day and, finding that they were in bad condition, refused to accept them.

The defendant contends that both as matter of law and as matter of contract it had a right to inspect the cabbages "before the drafts on the cabbages were paid;" that the plaintiff was bound to ship them in such a way that it would have this right of

* The case was tried before *Hitchcock, J.* The jury found for the plaintiff in the sum of \$375.41; and the defendant alleged exceptions.

inspection; that the plaintiff shipped them in such a way that (1) it (the defendant) did not have a right of inspection, and in such a way that (2) the railroad did not have the right to allow it (the defendant) to inspect the contents of the cars before paying the drafts, and therefore it was of no consequence whether the defendant was or was not active in trying to get a right to inspect the cabbages between April 5 and April 20.

In this connection the presiding judge in substance told the jury that if the defendant had a right under its contract to inspect the cabbages for the purpose of determining whether they did or did not comply with the terms of the contract, and if the defendant made a request to be allowed to inspect the cabbages within a reasonable time and that right [the right to inspect] was denied by the plaintiff and the denial of the right caused deterioration in the condition of the cabbages so that they became damaged, the defendant would not be obliged to take the cabbages if this delay was due to the plaintiff.

The defendant took an exception to this part of the charge on the ground that the judge had told the jury "that the defendant was obliged to request the plaintiff to give an opportunity to inspect," his contention being, as he stated, "that it was up to the plaintiff to ship them in such a way that we could have inspected them without any request on the part of the defendant."

The plaintiff consigned the cabbages to himself at Boston, indorsed the bills of lading in blank, attached them to drafts on the defendant for the purchase money and transferred both to a Sherburne bank which sent them forward to a bank in Boston. Under those bills of lading the defendant was a stranger to the shipment. It had no right to inspect the cabbages and the railroad had no right to allow it to inspect them. The plaintiff directed the railroad to "notify" the defendant, but he did not direct it (as he might have done) to allow the defendant to inspect the contents of the cars before they secured a right to do so by becoming indorsees of the bills of lading on payment of the drafts. See *South Deerfield Onion Storage Co. v. New York, New Haven, & Hartford Railroad*, 222 Mass. 535. The president of the defendant corporation testified that there had been many previous dealings in cabbages between the plaintiff and the defendant and "that in all of his previous dealings with Paddleford

that inspection was permitted by the railroad company before the drafts on the cabbages were paid. . . . That there was a custom in relation to the purchase of cabbages in the trade. That the custom was to allow the buyer to examine cabbages shipped as these were whether any express agreement was made to that effect or not."

If the jury found that under the contract the defendant had a right to inspect the cabbages before paying the drafts, any loss coming from deterioration caused by the cabbages having been shipped by the plaintiff in such a way that the defendant could not inspect them ought to fall on the plaintiff. In place of giving the jury an instruction to that effect the presiding judge told them that the loss would fall on the plaintiff only if the defendant made a request within a reasonable time to be allowed to make an inspection and that right was denied by the plaintiff. The exception to this ruling must be sustained.

We add (to avoid misunderstanding) that in the case at bar as in *Alden v. Hart*, 161 Mass. 576, it is immaterial whether the right of inspection was a condition precedent to the property in the cabbages passing to the defendant or was a condition subsequent enabling the defendant to rescind if on inspection the cabbages were found not to be what the contract called for. See also *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426, 430; *Hanson & Parker, Ltd. v. Wittenberg*, 205 Mass. 319, 328; *Williston on Sales*, (2d ed.) 473, 474.

In addition to the ruling involved in the exception which we have sustained the presiding judge was wrong in two matters which ought to be noticed in connection with the new trial which will have to take place.

Both parties have assumed that the contract between the plaintiff and the defendant was to be governed by the law of New York and not by the law of Massachusetts, and both parties introduced evidence on that point. The defendant put in evidence the case of *Pierson v. Crooks*, 115 N. Y. 539. In his charge to the jury the presiding judge told them what the rule of law was which that case established. But if there was a question upon that point it was a question to be decided by the jury not by the judge. It is enough upon that point to refer to *Electric Welding Co. Ltd. v. Prince*, 200 Mass. 386.

In addition the judge was wrong in assuming that the contract between the plaintiff and the defendant was a contract for the delivery of "Danish cabbage." This was or may have been of importance because the judge told the jury (and apart from his charge it could have been found by them) that *Pierson v. Crooks*, *ubi supra*, did not apply to a case where the goods to be shipped were not goods of a "specific quality." The contract between the plaintiff and defendant was a contract for "fine stock" cabbages not for "Danish cabbage" as the presiding judge assumed. On May 22, 1911, the plaintiff in a letter wrote the defendant: "Offer you 2 cars next week's shipment fine stock @ \$10." On the next day (March 23, 1911) the plaintiff telegraphed to the defendant: "Offer 2 cars Danish Cabbage @ \$10. per T. f. o. b. Sherburne." The despatch signed by the defendant in which he accepted the plaintiff's offer was in these words: "Letter received ship two cars cabbage offered." It is plain therefore that the offer which the defendant accepted was the offer contained in the letter and not that contained in the telegram. Indeed there is a statement to that effect in the bill of exceptions. From this it follows that the contract between the parties was for the delivery of "fine stock" cabbages and not for "Danish cabbage." It might have been found, therefore, that the contract in the case at bar was a contract for goods of "a specific quality" and so within the decision in *Pierson v. Crooks* in case the jury found that the rule laid down in that case was limited to contracts of that kind.

The entry must be

Exceptions sustained.

The case was submitted on briefs.

J. P. Fagan, for the defendant.

G. V. Phipps, F. Durgin & R. A. B. Cook, for the plaintiff.

ARTHUR L. BRACKETT vs. COMMONWEALTH.
BUTCHERS SLAUGHTERING AND MELTING ASSOCIATION vs. SAME.
ARTHUR L. BRACKETT vs. SAME.
BUTCHERS SLAUGHTERING AND MELTING ASSOCIATION vs. SAME.

Suffolk. November 30, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Commissioners, Appointed by court under statutory authority. *Damages*, For land taken or impaired under statutory authority. *Bridge. Jurisdiction. Supreme Judicial Court. Superior Court. Evidence*, Of value, Admissions and confessions.

Commissioners appointed by a court under statutory authority, in the absence of an express provision to the contrary, must report their doings to the court by which they were appointed.

An Act of Congress approved February 27, 1911, authorized the metropolitan park commission, when authorized to do so by the State of Massachusetts, to construct drawless bridges across the Charles River connecting River Street in Cambridge and Cambridge Street in the Brighton district, so called, of Boston, and provided, "That before the construction of said bridges or any of them is begun, the State of Massachusetts shall by legislative enactment provide for adequate compensation for the owner, owners, lessee or lessors of property abutting on said river above any of the said bridges, for damages if any caused to said property or leasehold interests therein by reason of interference with the access by water to said property, due to the construction of bridges without draws: Provided further, that said legislative enactment shall provide for the appointment of three commissioners to hear the parties in interest and assess the damages to said property; their decision as to the amount of damages and questions of fact to be final; said commissioners to be appointed by the Supreme Judicial Court of Massachusetts." St. 1911, c. 439, giving authority to the metropolitan park commission to rebuild any of the existing bridges over Charles River within the metropolitan park district whenever funds for the purpose should become available by gift under the provisions of that statute, complied with the requirements of the act of Congress above described, and provided that "Upon petition of any such owner or lessee entitled to such damages, filed in the Supreme Judicial Court within one year after any such bridge without a draw is opened for public travel, said court shall appoint three commissioners to hear the parties in interest, and to assess the damages to said property; and the decision of said commissioners as to the amount of said damages and as to questions of fact involved shall be final." On petitions brought under this statute, and on others brought in the Superior Court, it was held:

1. That the commissioners appointed under this statute were officers of the Supreme Judicial Court by whom they were appointed, and that that court had

the power and was charged with the duty of enforcing the report of such commissioners if it was according to the law and ought to be enforced.

2. That therefore the Superior Court had no jurisdiction over the petitions filed in that court, the remedy afforded by St. 1911, c. 439, being sufficient and exclusive.
3. That the provision, that "the decision of said commissioners as to the amount of said damages and as to questions of fact involved shall be final," raised the implication that in other respects their decision is not final and that questions of law raised in the report may be reviewed. Moreover it was apparent on the report upon the present petitions that the commissioners intended to proceed and decide according to law.
4. That, while this court would review the report, it would not set it aside nor send the case back for rehearing unless there appeared to be some probability that an appreciable change would be made in the report by a correction of the mistakes, if any there were, and unless substantial justice required that course.
5. That an owner and a lessee of the same real estate abutting on the Charles River should bring separate petitions under the statute for the assessment of damages; that the only damage which the owner of such leased property can recover is that sustained by the part of the whole property which is left after deducting from it the value of the lessee's interest, and that the duty of the commissioners is to find separately the damages suffered by each petitioner.

At a hearing before commissioners on a petition by a lessee of real estate bordering on a river for the assessment of damages under a statute giving damages to such a lessee for injury to his leasehold interest by the construction of a bridge without a draw across the river by reason of interference with the access by water to the real estate occupied by him, it is proper for the commissioners to exclude a question asked the petitioner on his cross-examination in regard to the profits of his business, such profits being too remote to have any necessary bearing upon the issue of the injury to his leasehold interest.

Since the enactment of St. 1903, c. 437, § 48, which provides that the return made by a domestic business corporation to the tax commissioner "shall be open only to the inspection of the tax commissioner, his clerks and assistants, and such other officers of the Commonwealth as may have occasion to inspect it for the purpose of assessing or of collecting taxes," such returns are not admissible in evidence at a hearing upon a petition by a domestic business corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner.

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to his leasehold interest.

At such a hearing it is proper to exclude statements made to an assessor by one who was a director, a clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager as to the value of the petitioner's real estate, where it does not appear that these officers were author-

ized by the corporation to speak for it on that subject or that such statements were within the scope of their official duty.

At such a hearing the fact, that the petitioning corporation paid taxes upon the same valuation of its real estate after the construction of the bridge that was alleged to have injured its property that it paid before the bridge was constructed, is not an admission by the petitioner that there had been no change in value, such valuation being that of the assessors and not of the petitioner. Nor is the failure of the petitioner to claim an abatement such an admission.

RUGG, C. J. The first two of these cases are petitions brought for the assessment of damages alleged to have been sustained by the petitioners as lessee and owner respectively of property abutting on the Charles River above the Stadium or Anderson Bridge, caused by the construction of that bridge, built in accordance with St. 1911, c. 439. Upon these petitions commissioners were appointed by the Supreme Judicial Court for the county of Suffolk, to hear the parties and to assess their damages, whose award was returned into that court. The Commonwealth filed numerous exceptions to the report and moved to recommit the report for the same reasons in substance set forth in its exceptions. The petitioners asked for a ruling that the court had no jurisdiction to receive or to act respecting the report, and that it be stricken from the files and returned to the commissioners. The single justice * denied these requests for rulings, overruled the exceptions, refused to recommit the report, ordered it confirmed and then reported all questions of law involved for determination by the full court. The last two cases are petitions brought by the same petitioners in the Superior Court against the Commonwealth under R. L. c. 201, seeking collection of the amounts awarded by the commissioners. The Commonwealth demurred and answered in abatement. A judge of the Superior Court † overruled the demurrers and answers in abatement and then reported the cases.

1. The first essential step open to a person damnified in his estate by the construction of the bridge was to file a petition in the Supreme Judicial Court. That of itself is implication that that court acquired and retained jurisdiction of the cause of action described in the petition. The next step in the procedure was the appointment by that court of three commissioners. The entire authority of the commissioners came from that appointment.

* *Braley, J.*

† *McLaughlin, J.*

They were thereby empowered and directed to perform the duties set out in the order of appointment, and to execute the functions described in the statute. In the absence of express provision to the contrary, they were officers of the court. By imperative inference, they were required to make report of their doings to the court by which they were appointed. They stand on the same footing in this regard as auditors, masters and referees. As was said by Chief Justice Gray, with affluent citation of authorities, in *Wyman v. Eastern Railroad*, 128 Mass. 346, 347: "It is settled, by repeated decisions, that commissioners appointed by this court and deriving all their powers from their judicial appointment must, by necessary implication, without any express statute direction, return their award to the court which appoints them, to be there examined, and, if no sufficient cause to the contrary is shown, confirmed and recorded." *Kingman, petitioner*, 153 Mass. 566, 579.

The consent of the United States was necessary for the construction of the bridge. That consent was given by act of Congress approved February 27, 1911.* It there was enacted that,

* That act of Congress is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Metropolitan Park Commission, or any town or city, or any other public body authorized by the State of Massachusetts, all or any of them, be, and they hereby are, authorized to construct, at any time hereafter, drawless bridges across the Charles River in the State of Massachusetts connecting River Street in Cambridge and Cambridge Street in the Brighton district, so called, of Boston, and at any other points upon said river, at, near, or above said Cambridge and River Streets: Provided, That said bridges shall be at least twelve feet above the ordinary level of the water in the basin over the main ship channel, and the piers and other obstructions to the flow of the river shall be constructed in such form and in such places as the Secretary of War shall approve: Provided further, That before the construction of said bridges or any of them is begun, the State of Massachusetts shall by legislative enactment provide for adequate compensation for the owner, owners, lessee or lessees of property abutting on said river above any of the said bridges, for damages if any caused to said property or leasehold interests therein by reason of interference with the access by water to said property, due to the construction of bridges without draws: Provided further, That said legislative enactment shall provide for the appointment of three commissioners to hear the parties in interest and assess the damages to said property; their decision as to the amount of damages and questions of fact to be final; said commissioners to be appointed by the Supreme Ju-

before the construction of the bridge could begin, the State of Massachusetts should, by legislative enactment, provide for adequate compensation for persons suffering injury like in kind to that claimed by the petitioners, and "Provided further, That said legislative enactment shall provide for the appointment of three commissioners to hear the parties in interest and assess the damages to said property: their decision as to the amount of damages and questions of fact to be final: said commissioners to be appointed by the Supreme Judicial Court of Massachusetts." The material parts of the act of Congress were embodied in St. 1911, c. 439, § 2.

This act of Congress does not constitute the commissioners federal officers. They do not derive their authority in any degree from the United States. The Congress having the power to withhold consent for the construction of the bridge, or to grant consent upon whatever terms seemed wise, imposed as conditions to the granting of its consent, that provision should be made for awarding damages to persons suffering damage like that claimed by the petitioners, and that such damages should be ascertained by commissioners appointed by the highest court of the Commonwealth. These conditions could be performed only by the General Court of Massachusetts acting within the scope of its legislative powers and providing for the exercise of judicial functions by a State tribunal. Doubtless the injuries sustained by the petitioners were of a kind for which at common law no action would lie and no constitutional right would have been infringed if no provision for compensation to them had been made. *Blackwell v. Old Colony Railroad*, 122 Mass. 1. *Dwyer v. New York, New Haven, & Hartford Railroad*, 209 Mass. 419. But the Commonwealth was not thereby precluded from awarding them damages. Statutory compensation is not imperatively confined to the boundaries of strict rights secured by the paramount law. *Earle v. Commonwealth*, 180 Mass. 579, 583.

dicial Court of Massachusetts. Except as inconsistent herewith, this Act shall be subject to the provisions of an Act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March twenty-third, nineteen hundred and six.

"Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved."

Manifestly, compliance with the conditions imposed by the act of Congress did not establish a federal but a State commission, deriving its authority from the State court by which it was appointed and to which it must report. The act of Congress does not purport to provide affirmative action on the part of the United States. It simply allows the State to enact a comprehensive scheme of legislation for the construction of the bridge, including compensation for injury to property, which so far as it affects that part of the field over which Congress has power, must comply with certain conditions. But it is a State scheme throughout when made vital by act of the General Court of Massachusetts. The commissioners, when appointed under this special statute, were officers of the court by which they were appointed.

2. It would be most unusual, if not unprecedented in our legislative history, to clothe a court with the duty to appoint commissioners to determine damages, and deprive it of power to enforce its award. St. 1911, c. 439, § 3, makes ample provision for meeting the expenditures incurred under the act out of the resources of the Commonwealth. There is a necessary implication that the Supreme Judicial Court has the power and is charged with the duty of taking whatsoever steps may be appropriate to see that the report of the commissioners is enforced, provided it is according to the law and ought to be enforced.

3. It follows from what has been said that the Superior Court has no jurisdiction over the petitions filed in that court. Since St. 1911, c. 439, is sufficient and complete in itself as to remedy for damages, that affords the means provided by the Commonwealth for the enforcement of rights against itself. It cannot be implied in any other manner or in any other court. *McArthur Brothers Co. v. Commonwealth*, 197 Mass. 137, and cases there collected.

4. The court has power to examine the report of the commissioners and review it as to any errors of law apparent on its face. This power is ordinarily a part of judicial duty. In the absence of express statute or law to the contrary, it inheres in a court appointing its officers to make investigations. It is provided in § 2 of the instant statute that "the decision of said commissioners as to the amount of said damages and as to questions of fact involved shall be final." The fair implication from these

words is that in other respects their decision is not final, but is subject to usual court procedure, and that questions of law raised in the report may be reviewed. The statute did not constitute the commission a board of referees or arbitrators, to whom all issues between the parties, both of law and fact, were to be submitted irrevocably. It is quite distinguishable from that before the court in *Selectmen of Danvers v. Commonwealth*, 184 Mass. 502, 506. Since neither the statute, the rule of court, nor agreement of parties made the commissioners referees or arbitrators, the well settled principle that the award of arbitrators or referees will not be set aside for alleged errors of law, is not applicable. *Fairchild v. Adams*, 11 Cush. 549. *Electric Supply & Maintenance Co. v. Conway Electric Light & Power Co.* 186 Mass. 449. *Darrow v. Braman*, 201 Mass. 469. Moreover, it is apparent from the report that the commissioners intended to proceed and to decide according to law. It has been said that, under such circumstances, even an award of arbitrators or referees may be reviewed to correct errors of law. *Spoor v. Tyzzer*, 115 Mass. 40. *Davis v. Henry*, 121 Mass. 150. See *Gloucester Water Supply Co. v. Gloucester*, 185 Mass. 535. The controlling principle in the case at bar is stated in *Boston & Worcester Railroad v. Western Railroad*, 14 Gray, 253, at page 258, in these words: "They [the commissioners] are constituted a board for the performance of certain services under the statutes; but as they derive all their right and power to act in the premises at all from their judicial appointment, the court by which it is made will so far supervise and control their proceedings, as to see that, in discharge of the duties thus imposed upon them, they have acted within the scope, and have neither exceeded nor failed to exercise the full measure of authority with which they are invested. In considering their return, if it be found that they have thus acted, their doings and decisions will not be interfered with."

While, therefore, the court will review the report, it will not be set aside nor the case sent back for rehearing, unless there appears to be some probability that an appreciable change would be made in the report upon a correction of the mistakes, if any there are, and unless substantial justice requires that course. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 552. *Pigeon's Case*, 216 Mass. 51, 55.

5. There was no error in the exclusion of the questions, put by the Commonwealth to the petitioner Brackett upon his cross-examination, touching the profits of his business. The question on trial was the injury to his leasehold estate. The profits of his business were too remote to have any necessary bearing upon that issue. *Bailey v. Boston & Providence Railroad*, 182 Mass. 537, 539. *Boom Co. v. Patterson*, 98 U. S. 403, 410. If incompetent evidence touching that point had been injected in the case by the petitioner, the proper course was to move to have it stricken out, not to meet it by further inquiry into an irrelevant subject.

6. The Attorney General offered the original tax returns of the petitioning corporation filed with the tax commissioner of the Commonwealth and taken from his custody for the purpose of evidence before the commission. These returns are required by law to be in detail. It may be presumed that they contained statements as to value material to the issues on trial. It is matter of common knowledge that formerly such returns often have been used in evidence, when values therein stated became material in actions, by the persons making them. But in St. 1903, by § 48 of c. 437, it was enacted for the first time that such return "shall be open only to the inspection of the tax commissioner, his clerks and assistants, and such other officers of the Commonwealth as may have occasion to inspect it for the purpose of assessing or of collecting taxes." This provision has been continued in St. 1909, c. 490, Part III, § 40, and St. 1914, c. 198, § 6. It indicates a legislative determination not only that it shall not be open to general observation, but that it shall not be used for any purpose other than that stated in the statute. Thus its evidential character is also affected. The statute manifests a purpose that such returns shall not be used as evidence in the ordinary case. *Bowman v. Montcalm Circuit Judge*, 129 Mich. 608, 610. The reason for treating tax returns as not open to use by usual methods has been recognized. *Boske v. Comingore*, 177 U. S. 459, 469. *In re Joseph Hargreaves, Ltd.* [1900] 1 Ch. D. 347. It is not here intimated that in a criminal proceeding involving the integrity of the return, it might not be produced in court. Therefore, there is nothing inconsistent with this conclusion in *Commonwealth v. Ryan*, 157 Mass. 403.

7. Certificates of condition filed with the Secretary of the Commonwealth by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, were received in evidence. These contained statements as to value of its real estate, which tended to contradict the value as shown by evidence introduced by the corporation at the hearing. These certificates were competent evidence as admissions by the petitioner as to the value of its real estate. *Smith v. Paul Boyton Co.* 176 Mass. 217. There appears in the record to be no other ground on which such certificates could have been received in evidence. It must be assumed that they were given the weight to which under all the circumstances they were entitled. But they were not binding admissions in the sense that the real value could not be shown by other competent evidence. The request for ruling, to the effect that the certificates constituted an admission by the corporate petitioner, taken in conjunction with the request to rule that they were binding on the other petitioner, implies that these requests went beyond the plain proposition just stated. The requests appear to seek to have attached to the certificates a conclusiveness on the question of value which they did not possess. No reversible error is shown in this respect. It is not necessary now to determine the effect of such certificates where persons have acted upon the information disclosed in them. *Steel v. Webster*, 188 Mass. 478, 480.

8. Plainly these certificates were not admissions binding the other plaintiff, who had nothing to do with making them.

9. The testimony as to statements made by one who was a director, a clerk and the auditor of the corporate petitioner, and by another who was its vice president and managing director, to an assessor of the city of Boston, as to the value of that petitioner's real estate, rightly was excluded. It does not appear that these officers were authorized by the corporation to speak for it on that subject, or that such statements were within the scope of their official duty. *Wellington v. Boston & Maine Railroad*, 158 Mass. 185. *Gilmore v. Mittineague Paper Co.* 169 Mass. 471.

10. The payment of taxes upon the same valuation of its real estate, after as before the erection of the bridge, was not an admission that there had been no change in value. The valuation was not the act of the landowner, but of the assessors. For the same reason, the payment of taxes worked no estoppel as to valua-

tion. Nor was the failure to claim an abatement of consequence in this connection. *Raynes v. Bennett*, 114 Mass. 424.

11. The commissioners reported that the damage to Brackett, on account of "his leasehold interest," was \$18,000, and "the loss on his fixtures to be \$3,400, a total of \$21,400." It appears from another part of the report that what here was referred to as fixtures was a "coal plant," consisting of a shed, automatic railways, steam shovel, and a wharf. While the phrase of the decision in this respect is not felicitous, it appears to mean that the commissioners undertook to divide the damages between the two elements of land and of structures upon the land. That which the commissioners termed fixtures were structures annexed to the land and hence real estate. They were to become the property of the lessor at the end of the lease. These so called fixtures were as much a part of the leasehold interest as was the land itself. The right to occupy for the term of the lease the land, wharf and buildings, with their attached machinery and appliances, was the estate which constituted the leasehold interest of the petitioner Brackett. Although such a division may be necessary sometimes, *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad*, 209 Mass. 298, 314, there seems to have been no occasion for it here. But the form of the report in this particular does not require reversal.

12. It is contended with great earnestness in behalf of the Commonwealth, that the form of the report shows that the commissioners found the entire damages to the estate of which the corporate plaintiff owned the fee, on the basis that it as owner was in possession of the entire estate without deduction on account of the leasehold interest of Brackett, and then found the damages to Brackett's leasehold interest as a separate matter, thus including that item twice. That contention is based on the form of the report, especially in the light of the defendant's nineteenth request for ruling, which the commissioners gave. The form of the report in this particular is as follows: "In petition No. 21110, Butchers Slaughtering and Melting Association, we find that the value of the property before the building of the bridge was \$290,000, and after the building of the bridge the value was \$237,000. We therefore find for the petitioner and assess damages in the sum of \$53,000, together with interest from December 11,

1912 to July 29, 1915, the date of filing this report, amounting to \$8,374.00 making a total of \$61,374.00. In petition No. 21109, Arthur L. Brackett, we find the value of his leasehold interest to have been \$30,000 above the rental, and it was damaged to the extent of \$18,000, and we find the loss on his fixtures to be \$3,400, a total of \$21,400, with interest from December 11, 1912 to July 29, 1915, the date of filing this report, amounting to \$3,381.20 making a total of \$24,781.20." This, standing alone, while not expressed with great clearness, does not seem open to misconstruction. All that the corporate petitioner could recover under its petition was the damage it had sustained to its real estate. It did not own free from incumbrance the entire real estate, but its title was subject to the incumbrance of the leasehold interest of Brackett. The only damage which in law the corporation could recover or be entitled to was that sustained in that part of the whole estate which was left after deducting from it the value of Brackett's leasehold interest. When, therefore, the commissioners refer to the petition of the corporation by number as constituting the cause of action on which the finding of damages is made, the rational inference is that they meant only that portion of the entire parcel of real estate for which that petitioner was in law entitled to recover damages. But the commissioners granted the defendant's request No. 19, to wit: "The findings by the commission should contain these figures: (a) the value of the entire tract of land immediately prior to December 11, 1912; (b) the value of the entire tract of land immediately subsequent to December 11, 1912, (c) the value of the leasehold immediately prior to December 11, 1912; and (d) the value of the leasehold immediately subsequent to December 11, 1912." Although this introduces some confusion and has caused doubt, yet it does not quite seem to overcome the statement from the report which has been quoted. That request, strictly construed according to the interpretation contended for at the argument on behalf of the Commonwealth, in (a) and (b) did not relate to any issue upon which the commissioners were required to pass. Their duty, as has been said, was to find the damages sustained by each of the petitioners. Separate petitions rightly were brought, and the damages were to be separately assessed. Although granting that request, the commissioners did not in express terms find the value

of the leasehold immediately before December 11, 1912, and immediately subsequent to that date. Those amounts can be ascertained only after some figuring. The plain duty of the commissioners was to find separately the damages suffered by each petitioner. They had performed that duty by the report as framed. Under all the circumstances, the only reasonable interpretation is to hold that the meaning of the report was not intended to be nullified by granting the request No. 19; but that the commissioners supposed they had complied with the request by the report, by finding the damages which the plaintiff corporation had suffered in its own right, and the damages which Brackett has sustained in his right.

The petitions pending in the Superior Court are to be dismissed for want of jurisdiction. In the petitions pending in the Supreme Judicial Court, the rulings of the single justice were right and the order confirming the report is affirmed in each case.

So ordered.

J. N. Clark, for the petitioners.

R. S. Hoar, (*J. W. Corcoran*, Assistant Attorney General, with him,) for the Commonwealth.



JESSIE BRERETON vs. MILFORD AND UXBRIDGE STREET RAILWAY COMPANY.

Middlesex. December 1, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Street railway, In use of highway. *Evidence*, Of fact undisputed at trial.

If a woman fifty-two years of age, who is deaf but can hear a whistle of a street railway car for a distance of twenty or thirty yards, walks along a path on one side of a village street that has no sidewalk, which path is at the outer edge of a single track of a street railway that is laid at the side of the street, the surface between the rails being filled to the level of the street, and which is the only path for pedestrians at that place, and, having in mind the possibility of the approach from behind her of a car at about that time, she looks back twice, and then goes on not more than one hundred and thirty-five feet from the point

from which she looked back the second time, when she is run down from behind by a street railway car that gives no signal of its approach and whose motorman, knowing that the woman is unaware of the car's approach, makes no effort to stop the car until it is within half a car's length of her, in an action by the woman against the corporation operating the car for her injuries thus sustained there is evidence for the jury that the plaintiff was in the exercise of due care and that the defendant was negligent.

In an action against a corporation operating a street railway for personal injuries alleged to have been caused by running down the plaintiff with a car of the defendant, when, after a verdict for the plaintiff, the case was before this court upon the defendant's exceptions, the defendant's counsel in his brief suggested for the first time that there was no evidence that the defendant was operating the street railway on which the plaintiff was injured. The bill of exceptions showed that at the trial two plans were put in evidence by the defendant and were marked as exhibits, and on each of these plans, which were before this court, the railway track was designated in printed letters as the track of the defendant, the corporate name being given. *Held*, that, in the absence of any evidence to the contrary, this warranted a finding that the car which struck the plaintiff was operated by the defendant.

CROSBY, J. The plaintiff, while travelling on foot on Hollis Street in the village of South Framingham, was struck from behind by an electric car of the defendant and thereby received * the injuries for which this action is brought.

The defendant's single track, which runs from South Framingham toward the town of Holliston, is on the left side of Hollis Street and within the finished surface of the highway.

At the time of the accident the plaintiff was fifty-two years old. She was very deaf, but there is nothing to show that she was not in full possession of her other senses. She lived on Hollis Street and on the day of the accident was returning from the village of South Framingham to her home. When she reached Winthrop Street, she crossed from the right to the left side of the street, and continued walking along the left side of Hollis Street. She testified that "just before she crossed over George Street she looked back; then after crossing George Street, she looked back the second time when half way between George Street and the place of the accident." She further testified that while she was deaf, she could hear a car whistle for a distance of twenty or thirty yards, and could hear a dog bark; that she heard no whistle or gong before she was struck. There was evidence to show that there was

* On October 28, 1913.

no sidewalk along the left side of the street at the place of the accident. The defendant introduced evidence to show that at that point there were two footpaths, one extending along the outer edge of the street railway track about two feet from the rail, and the other being nearer to the houses on the left side of the street.

The plaintiff contended and introduced evidence to show that at the place of the accident there was but one path or walk, that it extended along the outer edge of the track and that she was walking upon this path when hit by the car.

It appeared that the spaces between the ties and the rails were smooth and flush with the surface of the street. There was evidence that the path along the side of the track was worn and trodden down, and was much travelled by pedestrians.

The distance from George Street to the place of the accident was in dispute. The plaintiff contended that the jury could have found that this distance was one hundred and eighty feet, while the defendant offered evidence to show that it was two hundred and seventy feet. If, when the plaintiff looked back the last time, she was half way between George Street and the place of the accident, it could have been found that she had travelled either ninety feet or one hundred and thirty-five feet after she looked the last time. We do not consider it to be of controlling importance which estimate is correct.

The jury could have found that the plaintiff was travelling along the only path there was for pedestrians at the place where she was struck, and that this path was in common use by such travellers. She was in a place where she had a right to be, and was not prohibited from travelling upon the highway along the side of the railway track or even upon it.

It was her duty to exercise reasonable care for her own safety no matter what part of the way she saw fit to pass over. The accident occurred in the middle of the afternoon. She testified that she looked back twice within a distance of less than three hundred feet to see whether any car was behind her, and saw none; and that when she last looked she was at a point not to exceed one hundred and thirty-five feet from where she was hit by the car. She was in a general way familiar with the running of the cars, had met this car at Winthrop Street on its way to South Framingham, and knew that later it would return in the direction in which

she was going. The conductor testified that after she was struck she said she did not know it was time for the car. The jury could have found, from the speed of the car, from the distance which it had to travel and from all the circumstances, that she had in mind the possibility of its approach and was governing herself accordingly. Besides she had a right to rely in part upon the assumption that the motorman would not negligently and without warning run his car into her. *Carlson v. Lynn & Boston Railroad*, 172 Mass. 388. *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104. *Caput v. Haverhill, Georgetown & Danvers Street Railway*, 194 Mass. 218. *Callahan v. Boston Elevated Railway*, 205 Mass. 422. *McCue v. Boston Elevated Railway*, 221 Mass. 432.

The fact that the plaintiff was deaf made it incumbent upon her to be more alert in the use of her sense of sight to protect herself from harm, and the presiding judge* in substance so instructed the jury. *Smallwood v. Boston Elevated Railway*, 217 Mass. 375, 377.

We do not think that it could be ruled as matter of law that the plaintiff was not in the exercise of due care.

If the jury found that the motorman failed to give any signal after leaving George Street, that he knew that the plaintiff was unaware of the approach of the car and that he made no attempt to stop it until it had reached a point within half a car length of the plaintiff, they would have been warranted in finding that he was negligent. The jury were not bound to believe his testimony that she stepped into the path when the car was only fifteen or twenty feet away from her.

It follows that the defendant's first, second and fourth requests † were rightly refused. The fifth, ninth, thirteenth, fifteenth, six-

* *Hardy, J.* The jury returned a verdict for the plaintiff in the sum of \$7,500; and the defendant alleged exceptions.

† These requests were as follows:

"1. Upon all the evidence the plaintiff cannot recover, and the verdict must be for the defendant.

"2. The evidence fails to show that the plaintiff was in the exercise of due care, and the verdict must be for the defendant."

"4. There is no evidence in this case of negligence on the part of the defendant, and the plaintiff cannot recover."

teenth and seventeenth requests were covered by the charge so far as they properly could have been given.

The suggestion, which appears for the first time in the defendant's brief, that there is no evidence to show that the defendant was operating the street railway on which the plaintiff was injured, would seem to have been an afterthought. Two plans, marked "Exhibit 3" and "Exhibit 4," were introduced in evidence by the defendant, and upon each is printed the following: "Milford and Uxbridge Street Railway Track." This was sufficient to show that the car which struck the plaintiff was operated by the defendant in the absence of any evidence to the contrary.

The presiding judge fully and accurately instructed the jury upon the law applicable to the case, and we perceive no error in the conduct of the trial.

Exceptions overruled.

S. D. Vincent, for the defendant.

H. D. McLellan, (*P. O'Loughlin* with him,) for the plaintiff.

ELLA W. HAWKRIDGE & another, executrices, *vs.* TREASURER
AND RECEIVER GENERAL & others.

Middlesex. December 1, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Mortgage, Of real estate. *Tax*, On legacies and successions.

A resident of another State, who is the mortgagee under a mortgage of real estate in this Commonwealth, has an interest in the real estate that at his death is subject to a succession tax under St. 1912, c. 678, § 1.

DE COURCY, J. Edwin Hawkridge, a resident of the State of New Hampshire, died on October 21, 1914, leaving as a part of his estate promissory notes of the value of \$50,918.07, secured by mortgages on real estate situated in this Commonwealth. The only question before us * is whether these mortgages are subject to a legacy and succession tax.

* The case came up by an appeal from a decree of the Probate Court and was reserved by *Braley, J.*, for determination by the full court.

The statute in force at the death of the testator, namely, St. 1909, c. 490, Part IV, § 1, as amended by St. 1912, c. 678, § 1, provided that "All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the Commonwealth, and all real estate within the Commonwealth, or any interest therein, belonging to persons who are not inhabitants of the Commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a *bona fide* purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except . . . shall be subject to a tax. . . ." Accordingly the mortgages in question are subject to the tax if they constitute an interest in real estate within the meaning of this statute, and not otherwise.

Under the laws of this Commonwealth a mortgagee holds the legal title to the land, and not merely a lien upon it for security. As was said by Knowlton, C. J., in *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 370: "While, for general purposes, the interest of the mortgagee is treated as personal property, it has a local *situs*, and carries with it an ownership of the land until it is redeemed by the payment of the debt in performance of the condition. The debt, which is the obligation of the debtor to pay, and the land, which is the security for the payment of the debt, are individual parts of a single valuable property in the mortgagee, which may be made available in different ways." Under our tax laws that interest is subject to taxation as real estate. St. 1909, c. 490, Part I, § 16, provides: "If any person has an interest in real estate, not exempt from taxation under section five, as holder of a duly recorded mortgage given to secure the payment of a fixed and certain sum of money, the amount of his interest as mortgagee shall be assessed as real estate in the place where the land lies: and the mortgagor shall be assessed only for the value of such real estate after deducting the assessed value of the interest therein of such mortgagee." And § 18 enacts that mortgagors and mortgagees "shall for the purpose of taxation be deemed joint owners" until the mortgagee takes possession. To the same effect see St. 1881, c. 304, §§ 1, 3; Pub. Sts. c. 11, §§ 14, 16; R. L.

c. 12, §§ 16, 18. See also *Brooks v. West Springfield*, 193 Mass. 190, 193. The fact may be that assessors generally assess the whole estate to the mortgagor when no proper returns are filed under § 45; but they always have the power to tax the mortgagee's interest. *Sullivan v. Boston*, 198 Mass. 119.

The legislative policy to treat and tax as real estate the interest of the mortgagee, apparently has been extended to inheritance taxes. This was undoubtedly so before the amendments of 1912.

In *McCurdy v. McCurdy*, 197 Mass. 248, where a testator domiciled in another State died seised of real estate in this Commonwealth which was subject to a mortgage, it was held that the tax upon the succession to the real estate was to be assessed only upon the value of the equity of redemption. As was said later in the *Kinney* case, "This was equivalent to holding that, upon the death of the mortgagee, his interest in the real estate, to the amount of his debt, would pass in succession to his representatives." In the *Kinney* case it was held that mortgages on real estate in Massachusetts owned by a non-resident testator were subject to the tax on successions. It is true that under the statute then in force all property within the jurisdiction of the Commonwealth was subject to the tax, and it was not strictly necessary to determine whether the non-resident mortgagee held an interest in real or in personal property; but the reasoning on which the decision was based fully sustains the defendant's contention in the case at bar, that the mortgagee's interest is an interest in land, within the meaning of the succession tax law.

The plaintiffs rely largely on R. L. c. 150, § 7, under which a mortgage debt secured by real property is regarded as personal assets in the hands of the executor or administrator. Such has been the law in this Commonwealth for more than a century. St. 1786, c. 5, § 1. St. 1788, c. 51, § 1. Rev. Sts. c. 65, § 11. Gen. Sts. c. 96, § 9. Pub. Sts. c. 133, § 6. Nevertheless, as we have seen, the Legislature, since 1881 at least, also has recognized the mortgagee's interest as an interest in real estate for the purposes of taxation. It has been the established legislative policy to treat real estate mortgages as personal assets in the settlement of estates, and as retaining their character as an interest in real estate for the purpose of taxation. And it is significant of the maintenance of that policy that even since the passage of the statute under

consideration, the Legislature has enacted that certain mortgages of personal property, namely buildings and fixtures, "shall be deemed to be mortgages of real estate for the purposes of taxation." St. 1913, c. 636, § 1. In view of the Massachusetts rule, that the mortgagee has legal title to the land, and the long established legislative policy to treat the interest of the mortgagee as an interest in land for the purposes of taxation, we are of opinion that the Legislature intended to retain its right to impose a tax upon the succession to real estate mortgages held by non-residents, when they enacted that all real estate within the Commonwealth "or any interest therein," belonging to persons who are not inhabitants, shall be subject to a tax. The power to impose such a tax is unquestioned, even where the mortgage does not convey the legal title to the mortgagee. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421. *Allen v. National State Bank*, 92 Md. 509. *In re Rogers' estate*, 149 Mich. 305. *Mumford v. Sewall*, 11 Ore. 67.

The decree of the Probate Court is reversed, and the petitioners are instructed that the promissory notes and the mortgages on real estate securing them at the death of the testator were subject to a tax under St. 1912, c. 678, § 1.

Decree accordingly.

W. H. Hitchcock, Assistant Attorney General, for the Treasurer and Receiver General.

H. L. Boutwell, (*W. H. Hastings* with him,) for the plaintiffs.



MINNIE ST. JOHN vs. NELSON ST. JOHN & trustee.

Hampden. January 3, 1916. — March 1, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Contract, Performance and breach. *Damages*, In contract.

Where a married woman, who had left her husband on account of his habits of intoxication and had obtained work as a mill operative, was induced to return to her former home by a promise of her father-in-law to pay her \$1,000 if she

with her husband would make a home for the father-in-law, whereupon she accepted the offer and provided a home for her father-in-law as long as he remained there, but he soon married again and voluntarily took up his residence elsewhere and refused to pay the \$1,000 or any part of it, in an action against him by his daughter-in-law for breach of contract, it was *held*, that, the defendant having rendered further performance by the plaintiff impossible, the plaintiff, who had performed her contract as far as she could, was entitled to recover damages.

In the same case, it also was *held*, that, the defendant having failed to make any provision in the contract for the contingency of his marrying again and leaving the house of his son in a short time, was liable to the plaintiff for the full amount of \$1,000 which he had agreed to pay her.

CONTRACT for \$1,000 alleged to be due to the plaintiff under an oral agreement described in the opinion. Writ dated October 18, 1913.

In the Superior Court the case was tried before *Hamilton, J.*, who at the close of the evidence, which is described in the opinion, refused to rule that the plaintiff could not recover or to rule that the plaintiff could not recover \$1,000 as damages. The judge submitted the case to the jury and instructed them that if the plaintiff was entitled to recover anything she was entitled to recover \$1,000. The jury returned a verdict for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

The case was submitted on briefs.

W. H. McClintock, E. A. McClintock & J. F. Jennings, for the defendant.

H. B. Montague & A. R. Greeley, for the plaintiff.

BRALEY, J. The plaintiff, her husband and child, and the defendant, her father-in-law, a widower, lived together as a family in this Commonwealth until in consequence of the husband's habits of intoxication she left her home taking her child, and secured work in another State as an operative in a knitting mill. It was uncontroverted that shortly thereafter she was solicited by the defendant to return and re-establish the home. And while the pecuniary conditions upon which this was to be done were in dispute, the jury upon conflicting evidence would have been warranted in finding that the parties entered into the contract set out in the amended declaration. The words "make a home with her husband for the defendant" mean as construed by the judge at the trial, that the plaintiff should furnish him with shelter and food so long as he remained with the family. It is plain that no obliga-

tion was imposed to provide him with permanent support wherever he might choose to reside. The defendant being under no obligation to remain longer than he pleased, the jury could find that after a short time, having married again, he voluntarily left and took up his residence elsewhere.

It follows that, the defendant having rendered further performance impossible, the plaintiff, having done all on her part that the contract required, is entitled to damages for the breach. *Byrne v. Dorey*, 221 Mass. 399, and cases cited.

The measure of recovery remains for determination. The declaration alleges as the consideration, that the defendant agreed to "give the plaintiff one half of a certain mortgage note valued at \$2,000 or the equivalent of the same in cash" upon her return with him to their former home. It may be when he made the promise that the defendant did not expect to remarry. But this contingency as well as the possibility that he might die before the full consideration had been actually earned were not guarded against and form no part of the contract. Having complied with the condition, we see no reason why the plaintiff should not recover the amount stipulated. *Gardner v. Denison*, 217 Mass. 492. *Gunther v. Gunther*, 181 Mass. 217. *White v. Solomon*, 164 Mass. 516. *Earle v. Angell*, 157 Mass. 294. No error is shown in the refusals to rule or in the rulings given.

Exceptions overruled.

WILLIAM A. HARBROE'S (dependent's) CASE.

Suffolk. January 10, 1916. — March 1, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act, Injury arising out of employment. *Agency*, Scope of employment.

Where before daylight in darkness and fog a night watchman employed by a construction company was standing near the building of his employer with a bridge operator, when they saw a deputy sheriff and his assistant and each pair of men mistook the other pair for yeggmen who just before had robbed a post office near by, and thereupon shots were exchanged, by one of which the watch-

man sustained an injury resulting in his death, it was *held* that, assuming that such injury was received by the watchman "in the course of his employment," it could not be found that the injury was one "arising out of" his employment within the meaning of St. 1911, c. 751, Part II, § 1.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The facts found by the Industrial Accident Board are stated in the opinion. The decision of the board was as follows: "The board finds, upon all the evidence, that the employee, William A. Harbroe, received a personal injury resulting fatally, on October 9, 1914, which arose out of and in the course of his employment, by reason of the special risk attached to the performance of his duties as a night watchman in the service of the subscriber and that there is due the dependent, Edna May Harbroe, the widow of the employee, a weekly compensation of \$9.33 for a period of 428 676/933 weeks from the date of the injury, the total compensation payable by the insurer being \$4,000."

In the Superior Court *Jenney, J.*, made a decree confirming the decision of the Industrial Accident Board; and the insurer appealed.

A. L. Richards, for the insurer.

C. S. Morrill, for the dependent widow.

DE COURCY, J. The employee Harbroe was night watchman for the Furst-Clark Construction Company, which was engaged in work on the Cape Cod Canal at Buzzards Bay in Barnstable County. This company had buildings, machinery and other property on both the northerly and southerly side of the canal, and on the easterly and the westerly side of the tracks of the New York, New Haven, and Hartford Railroad Company — which tracks extended in a northerly and southerly direction on a bridge over the canal. At about 3 a.m. on October 9, 1914, one Hart, a deputy sheriff at Buzzards Bay, was notified that "yeggmen" had robbed the safe at the Bourne post office. Later Albert L. Trench, the bridge operator employed by the railroad company, and whose station was near the buildings of the construction company, notified the deputy sheriff that the robbers had just crossed the bridge. Hart and his brother, fully armed, started in pursuit. In the vicinity of the company's office building, they saw, and

were seen by, Trench and Harbroe. Each party, thinking that the others were acting in a suspicious manner, mistook them for the "yeggmen" in the darkness and fog, shots were exchanged, and Harbroe was fatally injured.

1. The insurer contends that the employee was "injured by reason of his serious and wilful misconduct." St. 1911, c. 751, Part II, § 2. According to the findings of the Industrial Accident Board, he was defending himself from attack by men whom he thought to be desperate criminals. There was some evidence that he did not use his revolver until after they had given the command "hands up" and had fired upon him and his companion, Trench. We cannot say, as matter of law, that the facts show such misconduct as would deprive an employee of compensation under the statute. And assuming that § 2 is applicable where the employee is killed (see Part V, § 2, defining "employee"), the same is true as to his dependents. *Nickerson's Case*, 218 Mass. 158. *Johnson v. Marshall, Sons & Co. Ltd.* [1906] A. C. 409.

2. The finding of the board, that Harbroe's injury arose in the course of his employment, has some support in the evidence. It occurred during his working hours, and on the path between the office and the machine shop of his employer. The fact that he and Trench had left the office after seeing the supposed "yeggmen" approaching is not conclusive that he had abandoned the care of his employer's property. He may have been on his way to some other part of the plant, where he would be in less apparent danger of bodily harm. At the time of the shooting he was in a place where he was accustomed to go in the performance of his duties. It is merely conjecture to say that he intended subsequently to leave the premises of his employer. *Pigeon's Case*, 216 Mass. 51. See *Ross v. John Hancock Mutual Life Ins. Co.* 222 Mass. 560.

3. The doubtful question is whether the injury arose out of the employment. It cannot reasonably be said that the risk of being shot by trespassing lawbreakers is incidental to or has its origin in the nature of a night watchman's ordinary employment. Undoubtedly there are particular instances where the occupation of a night watchman exposes him to risks substantially beyond the ordinary normal ones and where the employment involves and obliges the employee to face such perils. Where the employee's

injury is the result of such special risk incident to the employment and where there is "a causal connection between the conditions under which the work is required to be performed and the resulting injury," the injury "arises out of" the employment within the meaning of the workmen's compensation act. *McNicol's Case*, 215 Mass. 497.

In the application of this principle to cases of assault upon employees in the course of their employment the authorities are not in harmony. Some of these cases are referred to in *McNicol's Case*. In *Challis v. London & Southwestern Railway*, [1905] 2 K. B. 154, where an engine driver was struck by a stone thrown wilfully by a boy from an overhead bridge; and in *Nisbet v. Rayne & Burn*, [1910] 2 K. B. 689, where a cashier employed regularly to carry wages by train to a colliery was robbed and murdered in the course of the journey, it was held that the injury arose out of the employment. On the other hand, in *Blake v. Head*, 106 L. T. 822, 5 B. W. C. C. 303, where a felonious assault was committed by the employer, and in *Mitchinson v. Day Brothers*, [1913] 1 K. B. 603, where a carter in charge of his employer's horse was assaulted by a drunken man (both referred to in *McNicol's Case*), it was held that the injury did not arise out of the employment. *Anderson v. Balfour*, [1910] 2 Ir. R. 497, was the case of a gamekeeper who was attacked by poachers, but the question was whether the injury resulted from an "accident," not whether it arose out of the employment. The same is true of *Murray v. Denholm & Co.* [1911] Sess. Cas. 1087; S. C. 5 B. W. C. C. 496, where a workman was attacked by strikers. It was also held that the injury arose out of the employment in *Kelly v. Trim Joint District School*, 47 Ir. L. T. 151, affirmed by House of Lords [1914] A. C. 667, where a schoolmaster was assaulted by some of the boys whose enmity he had incurred owing to his efforts to maintain discipline; and in *Weekes v. William Stead, Ltd.* 83 L. J. K. B. 1542, where the yard foreman of a firm of furniture movers was fatally assaulted by one of the odd job men who was employed at times by the firm. See also *MacFarlane v. Shaw, (Glasgow) Ltd.* [1915] W. C. & Ins. Rep. 32. Among the cases *contra*, see *Collins v. Collins*, [1907] 2 Ir. R. 104. *Shaw v. Wigan Coal & Iron Co.* 3 B. W. C. C. 81. *Clayton v. Hardwick Colliery Co. Ltd.* [1914] W. C. & Ins. Rep. 343.

The question we have to determine is whether in the case at bar there was evidence upon which the board could find that Harbroe's death arose out of a special risk incident to the performance of his duties as a night watchman. There was no evidence that this property ever had been injured by wrongdoers, or that from its character or location it was especially exposed to theft or harm at the hands of trespassers. He was not shot while protecting his employer's property from thieves. At the time of this accident the property was in no way threatened, nor did Harbroe suppose it was. And he was not fired upon because he was the watchman in charge. The injury might quite as well have been suffered by any person who happened to be in the locality, whether employed by the construction company or not. Further, although Harbroe mistakenly believed that the two approaching figures were "yeggmen," they were in fact an officer of the law and his assistant, who were in the performance of their duty, seeking to apprehend the men who recently had robbed the post office. The injury which they inflicted was the result of an unfortunate misapprehension on their part (to which Harbroe himself unwittingly contributed), and cannot reasonably be said "to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence." *Reithel's Case*, 222 Mass. 163, 165. As was said in *Madden's Case*, 222 Mass. 487, 495, "The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." We are constrained to say that there was no evidence to support the finding that the employee's injury was one "arising out of" his employment. The decree is reversed and a new decree is to be entered in favor of the insurer.

So ordered.

LEONARD M. CROSS *vs.* BOSTON AND MAINE RAILROAD.SAME *vs.* SPRAGUE, BREED AND BROWN COMPANY.

Essex. November 30, 1915. — February 12, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Negligence, Employer's liability, In railroad yard on premises other than those of railroad corporation, Violation of usage, Want of light. *Usage*.

A railroad company is under no duty to point out to an experienced brakeman in its employ the existence, in a railroad yard on property of a coal company where the brakeman was in the course of his employment, of a post about three feet from a track, nor to warn him of its existence; and, since the enactment of the workmen's compensation act as before, if it appears that the post was placed, constructed and maintained by the coal company, there can be no recovery from the railroad corporation, not a subscriber under the act, in an action by such an employee against it for injuries caused by his being crushed in the night time between the post and a coal car upon which he was in the course of his employment, although such injuries were due to ignorance resulting from a lack of instruction or warning as to the post and by the dangerous condition of the premises arising from its maintenance where it was.

Nor, under such circumstances, where it also appears that one cause of the accident was the fact that a light, which customarily had shone upon the post against which the plaintiff was crushed, had been suffered to be unlighted, can the railroad company be held liable for the injuries if the coal company had undertaken the duty of keeping the yard lighted.

A coal company, which maintains as a part of its premises a yard containing tracks connecting with a railroad and used for transporting coal to and from its premises, is not liable for injuries received by an employee of a railroad corporation who, when on the premises in the course of his employment, is crushed in the night time between a freight car upon which he is riding and a post which supports an overhead structure in the yard, if such injuries were caused by the employee not being warned of the presence of the post or by the post being constructed and maintained dangerously near to the railroad track.

But if, under the foregoing circumstances, it also appears that the coal company had assumed the duty of keeping the yard lighted at night, that the employee of the railroad company relied on such lighting to warn him of the presence of dangerous structures, that a light, which customarily had shone upon the post against which the employee of the railroad was crushed, had been suffered by an employee of the coal company, who was charged with the duty of keeping the lights in the yard in order, to be and to remain extinguished, and that the accident was caused by the absence of such light, the coal company is liable for the injuries so received.

If, in an action by an experienced brakeman of a railroad company against a coal company for personal injuries received in 1913 while the plaintiff was at work

in the night time within the scope of his employment in a freight yard of the defendant, it appears that the plaintiff mounted a moving freight car at its side near its end and, as he was passing round to the end of the car, was struck and injured by a post dangerously near the track, of whose presence he did not know and which was not lighted by a light which the coal company customarily had maintained together with other lights throughout the yard, and that the plaintiff had come to rely upon the yard being lighted, there is evidence for the jury on the question of the due care of the plaintiff.

CARROLL, J. The plaintiff, a brakeman in the employ of the defendant in the first named action, hereinafter called the railroad, was injured by being crushed between the side of a coal car and a post on the premises of the defendant in the second action, hereinafter called the coal company.* The accident happened January 19, 1913, about half past three o'clock in the morning, at Beverly. The plaintiff was an experienced brakeman. He had been in the employ of the railroad for a period of eighteen or nineteen years; for seventeen years of that time he had worked at moving freight cars, and from 1910 to the time of the accident he had been in the yards of the railroad in Salem and Beverly. Beginning early in December, 1912, he went regularly each night with the train crew to the yard of the coal company, and from twelve o'clock midnight until five o'clock in the morning, worked as a brakeman moving cars in the coal company's yard and in an adjoining yard of the Guffey Oil Plant.

At the time of the accident, the plaintiff was holding the grab handle, standing on the step of the forward end of a moving car, was caught by a post between tracks three and four and thrown to the ground. This post was three feet one and five eighths inches from the track, and was the only post between tracks three and four. It was used as a support for an overhead framework upon which there was a narrow gauge track for the operation of small coal cars. The plaintiff testified that he never had seen this post nor had his attention called to it. Between tracks four and five there were six posts, varying from three feet six inches, to three feet nine and one half inches from track four, and four feet three and one half inches, to four feet and three fourths inches from track five. Between track five and the fence around the premises,

* The cases were tried together before *Hardy, J.*, who at the close of the evidence for the plaintiff ordered a verdict for the defendant in each action. The plaintiff alleged exceptions.

there was a post three feet two and one fourth inches from the rails. There were five thirty-two candle-power electric lights on posts between tracks four and five. The light nearest the post where the plaintiff was injured was six feet nine and five eighths inches distant. There was evidence that on the morning of the accident this light was not burning. The assistant treasurer of the coal company testified that between twelve o'clock midnight and five o'clock in the morning two employees of the coal company were on the premises, the weigher and the watchman. "The watchman flags the trains, sees that electric lights are all turned on and that they are in good condition. The lighting up of the yard is left to him. . . . It was the duty of Mr. Murphy, the night watchman, to keep the lights burning at the time coal was being shipped out of there."

The tracks were constructed by the railroad, under an agreement with the coal company, the latter to pay the expenses of construction. By the contract the coal company was to keep the track in proper repair outside the railroad location, the railroad company having the right to "refuse to operate on said track when its condition is unsatisfactory to the railroad." The coal company could terminate this contract on ten days' notice and the railroad on thirty days' notice, "upon the failure of the said shipper to comply with reasonable rules and regulations of the railroad." The railroad was not a subscriber under the workmen's compensation act. St. 1911, c. 751, Part IV.

1. The plaintiff contends that the railroad was negligent because of the nearness of the post to the track, the insufficient light which made the place unsafe and because of its failure to warn and instruct the plaintiff. A railroad company is not bound to instruct and point out to an experienced brakeman the location and distance of the abutments, bridges, poles and switches along the line of its track where he may be called to work, even where these objects are upon its own land. *Kempton v. Boston Elevated Railway*, 217 Mass. 124. *Bence v. New York, New Haven, & Hartford Railroad*, 181 Mass. 221. *Ryan v. New York, New Haven, & Hartford Railroad*, 169 Mass. 267. *Vining v. New York & New England Railroad*, 167 Mass. 539. *Thain v. Old Colony Railroad*, 161 Mass. 353. *Fisk v. Fitchburg Railroad*, 158 Mass. 238. Where these conditions exist at the time of employment, and are obvious, there is no negligence in continuing them, because no duty

or obligation of the master to the servant is violated, by suffering such obvious structures to continue as they are at the time of the contract; and this is so under St. 1911, c. 751. *Ashton v. Boston & Maine Railroad*, 222 Mass. 65. See also *Cullalucca v. Plymouth Rubber Co.* 217 Mass. 392, 396. Under ordinary circumstances a railroad corporation is not held to a higher degree of care in the management of its trains on the premises of another corporation than upon its own, and it cannot be held to the duty of pointing out and warning an experienced brakeman, who is called upon to work in these industrial yards along the line of the railroad, of the obstructions, buildings and poles which may be dangerous under certain conditions, especially when the construction and maintenance of these erections is not in the control of the master and may vary without notice from day to day. *Trask v. Old Colony Railroad*, 156 Mass. 298. *Engel v. New York, Providence & Boston Railroad*, 160 Mass. 260. *Moynihan v. King's Windsor Cement Dry Mortar Co.* 168 Mass. 450. *Hyde v. Booth*, 188 Mass. 290.

The railroad did not construct the post between tracks three and four. It had no control over it, and was not guilty of negligence because the coal company maintained it at this place as a support to its overhead structure. Nor was the railroad in any way responsible to the plaintiff for the condition of the lights. That was a work undertaken entirely by the coal company, with reference to which the railroad assumed no responsibility.

2. The coal company was not negligent in maintaining the post or in failing to warn the plaintiff of the danger which might arise from it. When the track was built, the coal pockets, the overhead track and the poles were placed substantially as they were when the plaintiff was injured. From April or May, 1912, the tracks were constantly in use, and it might reasonably be inferred that the men working there night after night were familiar with all the surroundings. It was not obliged to inform itself when an employee of the railroad began working in the yard and tell him of the danger. *Shaw v. Ogden*, 214 Mass. 475. *Marston v. Reynolds*, 211 Mass. 590. *Sullivan v. New Bedford Gas & Edison Light Co.* 190 Mass. 288.

The duty owed by the coal company to the employees of the railroad is the same as the duty owed to the employees of an independent contractor invited on its premises. The employees

take the apparatus and appliances as they find them, so far, at least, as they can be plainly seen; as to obvious and permanent obstructions, such as buildings or posts, there is no duty to warn or instruct. See *Sullivan v. New Bedford Gas & Edison Light Co. supra*; *Crimmins v. Booth*, 202 Mass. 17; *Cole v. L. D. Wilcutt & Sons Co.* 218 Mass. 71; *Pettingill v. William Porter & Son, Inc.* 219 Mass. 347.

There was evidence that the light nearest to the post where the plaintiff was hurt was out, and also that the only light in the yard came from an electric street light. It is suggested in the coal company's brief, that in switching coal cars where signals are given by lighted lanterns, the work is not facilitated if the yard is illuminated. That may be true, but it is purely a question of fact. The defendant for some purpose had installed electric lights in the yard and the duty of one of its employees was to keep the lights in good condition, "to keep the lights burning at the time coal was being shipped out of there." While it may be true on the evidence disclosed, that the coal company was not obliged to light the yard for the convenience of the railroad or of its servants and agents, and is not liable in damages to the plaintiff because of the mere fact that the yard generally was illuminated and on this night was dark, it is responsible, however, to the plaintiff, if it maintained the lights in the yard to assist him and his fellow servants in shifting and transferring the coal cars and they relied on this practice of the coal company. In voluntarily assuming this duty, it may be held liable for failure to comply with it. If the coal company kept the yard illuminated for the purpose stated and the plaintiff relied on the practice, and because of its failure in this respect he was injured, by failing to see the post, owing to the darkness, the jury could find the coal company to be negligent. It does not expressly appear for what purpose the yard was illuminated, but the jury could say it was for the purpose of aiding the men in doing their work and that the coal company assumed this duty. *Hanley v. Boston Elevated Railway*, 201 Mass. 55, 57. "Evidence of the usage of the road, that one train should not enter a station while another train was engaged in delivering passengers there, was competent upon the question whether the defendant's servants managed the train in a proper manner." *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152, 153.

The position of the coal company in habitually lighting the yard and its failure to comply with the practice in the present case is in some respects the same as that of the defendant who violates one of its own rules established for the safety of the public. If the usage, like the rule, is established for the safety of others, its violation by the company's servants is a departure from the standard of care it has itself decided to be necessary, and is evidence of negligence. As stated by Knowlton, C. J., in *Stevens v. Boston Elevated Railway*, 184 Mass. 476, at page 480: "Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety."

There was evidence of the plaintiff's due care. The jury might say, considering the darkness, the place where he mounted the car and the short space of time intervening between this act and the collision,* that he was careful, even though riding on the side of the car. In *Kempton v. Boston Elevated Railway*, 217 Mass. 124, it was assumed that the plaintiff who was on the side of a car while passing a post, was in the exercise of due care. In *Ladd v. Brockton Street Railway*, 180 Mass. 454, the plaintiff was injured in the forenoon of a bright day and twice before on the same day had passed by the place where he was injured. See *Stoliker v. Boston*, 204 Mass. 522.

In the case against the Boston and Maine Railroad the plaintiff's exceptions are overruled.

In the case against Sprague, Breed and Brown Company the plaintiff's exceptions are sustained.

So ordered.

E. S. Underwood, for the plaintiff.

C. A. Wilson, for the defendant Boston and Maine Railroad.

H. V. Cunningham, for the defendant Sprague, Breed and Brown Company.

* The plaintiff testified that he mounted at the side of the car near the end and was in the act of passing to a position between the ends of the cars when he was struck.

COMMONWEALTH v. HENRY C. CALLAGHAN.

Suffolk. January 19, 1916. — March 1, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Constitutional Law, Ex post facto law. Illegitimacy. Parent and Child. Non-support.

St. 1913, c. 563, § 7, making it a misdemeanor for the father of an illegitimate child to neglect or refuse to contribute reasonably to the support and maintenance of such child, whether such child shall have been begotten before or after the taking effect of that statute, is not an *ex post facto* law and does not violate art. 24 of the Declaration of Rights nor art. 1, § 9 of the Constitution of the United States.

It is not a defence to a complaint under St. 1913, c. 563, § 7, against the father of an illegitimate child for neglecting and refusing to contribute reasonably to the support of such child, that after the birth of the child the mother married another man who provides for the child's support.

Upon a complaint against the father of an illegitimate child for neglecting and refusing to contribute reasonably to the support of such child under St. 1913, c. 563, § 7, which incorporates by reference the provision as to practice contained in St. 1911, c. 456, § 7, that "proof . . . of the neglect or refusal . . . shall be *prima facie* evidence that such . . . neglect or refusal is wilful and without just cause," the jury can find that the defendant neglected or refused to contribute reasonably to the support of his child, although no demand to do so was made upon him during the three years preceding the time of the trial.

CARROLL, J. This is a complaint under St. 1913, c. 563, § 7, alleging that the defendant on June 5, 1915, and during the month next preceding, did neglect and refuse to contribute reasonably, to the support and maintenance of an illegitimate child, of whom he was the father.

The statute, which took effect July 1, 1913, declares that the father of an illegitimate child, whether begotten before or after the taking effect of the statute, who neglects or refuses to contribute reasonably to the support and maintenance of such child, shall be guilty of a misdemeanor, and, upon conviction, "liable to all the penalties and all the orders for the support of the child provided in the case of a parent who is found guilty of unreasonably neglecting to provide for the support and maintenance of a minor child." The defendant was found guilty in the Superior Court.

1. It is the contention of the defendant that the statute is *ex post facto*, conflicting with art. 24 of the Declaration of Rights of Massachusetts, and art. 1, § 9 of the Constitution of the United States. The statute does not attempt to punish the father for his past conduct; it does not attempt to punish him for begetting or neglecting to support the child before the statute took effect. The statute, from the time it became a law, requires the defendant, as the father of the child, to contribute to its support and maintenance, thus relieving the mother or others upon whom the burden may chance to fall.

If it is *ex post facto* legislation to compel the father to provide for the support of a child, not born in wedlock, because born before the statute was enacted, it might be argued that it is contrary to the Constitution to punish a husband under St. 1911, c. 456, for refusing to support his wife and children, because he was married and the children were born before the statute took effect; or to insist on a son of sufficient means supporting his parents under St. 1915, c. 163. We are of opinion that St. 1913, c. 563, is not *ex post facto* legislation.

2. Since the birth of the child, the mother has married and the child has been supported by her husband. About a "dozen times since they ceased to live together," she asked the defendant to contribute toward the support of the child, but he refused. She last saw him three years ago, "when she met him in front of his office, when she then asked him if he would not do something toward the support of the child, and he said he was married again and he had all he could do to take care of those he had and he did not intend to do anything." The fact that the husband of the mother has supported the child does not relieve the father of the duty imposed on him by the statute. See *Brookfield v. Warren*, 128 Mass. 287; *Purinton v. Jamrock*, 195 Mass. 187.

The jury could find on all the evidence, that the defendant neglected or refused to contribute reasonably to the maintenance and support of the child, although no demand was made on him during the three years preceding the time of the trial. It is provided in the statute that the practice under St. 1911, c. 456, shall apply to proceedings under the statute before us, and St. 1911, c. 456, § 7, enacts that "proof . . . of the neglect or refusal . . . shall be *prima facie* evidence that such . . .

neglect or refusal is wilful and without just cause." See *Commonwealth v. Rosenblatt*, 219 Mass. 197.

3. We see no error in the instructions of the judge.* Mrs. Huck, the mother, was the only witness; the defendant could not be convicted unless the jury believed her.

Exceptions overruled.

B. J. Killion, (C. Toye with him,) for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, was not called upon.

HYMAN E. KAPLAN & another vs. HERMAN GROSS & trustee.

Suffolk. October 22, 1915. — March 2, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Best and secondary, Book entries. *Witness*, Refreshing recollection. *Practice, Civil*, Exceptions. *Words*, "Account."

In an action, where it was material to show the number of glass fruit jars on hand at a certain time constituting a certain stock in trade, an inventory was offered in evidence which was made by a witness who testified that he counted the stock at that date personally with the exception of some of the jars that could not be counted because they were packed in bins and that as to these he took the record from a stock book that he kept by making entries from slips that were turned into the office by the glass blowers who made the jars. *Held*, that this inventory was not admissible independently of St. 1913, c. 288, and that it properly could not be admitted under that statute because the objectionable entries in the inventory were not entries "in an account kept in a book or by a card system or by any other system of keeping accounts," to which alone that statute relates.

In the case stated above, after the inventory wrongly had been admitted in evidence under the statute, there was testimony of the plaintiff's son tending to show that the defendant admitted that the inventory correctly described the number of fruit jars on hand when it was made, but there was nothing to show that this testimony was believed by the judge before whom the case was tried without a jury. *Held*, that this subsequent evidence did not cure the error of wrongly admitting the inventory under the statute, and that an exception to its admission should be sustained.

A witness cannot be allowed to refresh his recollection by a paper containing statements in regard to matters of which he never had any personal knowledge, because he can have no recollection to refresh.

* *Hall, J.*—

CROSBY, J. The plaintiff Hyman E. Kaplan and the defendant entered into a partnership in August, 1912, for the manufacture of bottles and glass jars. The partnership took over the property of a business which previously had been conducted unsuccessfully by the plaintiff's son under the name of the Elk Flint Bottle Company. There was excepted out of this property about three thousand gross of fruit jars which, in accordance with a written agreement between the parties, were "to be set aside as the personal property of said Hyman E. Kaplan." The partnership was dissolved on March 28, 1913, and on that date the parties entered into a written agreement which recited among other things that the plaintiff had sold his interest in the business to the defendant, but that the plaintiff retained his ownership in the fruit jars above referred to, which were to remain upon the premises formerly occupied by the partnership until September 30, 1913, without charge for storage or custody. The agreement also provided that the defendant should account to the plaintiff for all sums received from the sale of such fruit jars less certain expenses incurred by the defendant in making such sales. This action is brought to recover the value of a portion of the fruit jars which the plaintiff alleges that the defendant has not accounted for or delivered to the plaintiff. The defendant admits that he owes the plaintiff for sixty gross of these jars.

1. For the purpose of showing the number of jars for which the defendant was liable to account, the plaintiff offered in evidence a certain inventory of stock made on August 27, 1912, about which time the partnership was formed. This inventory was taken by one Greenstein, who previously had been employed as a shipping clerk by the Elk Flint Bottle Company. The inventory was offered subject to the defendant's objection and exception. The undisputed evidence showed that the inventory was made by Greenstein, who testified that he counted the stock on that date "personally, with the exception of some of the jars I couldn't count owing to the fact that they were so packed in bins that we couldn't consistently count them, but I took the record from a stock book that I had at that time and kept." It also appeared that the way in which the witness had ascertained the number of jars that were in the bins was "by counting the slips that were turned into the office, going over those slips upon which

the [glass] blowers that made the ware were paid, and entering them into a book kept at the warehouse for that purpose."

It is plain that independently of St. 1913, c. 288, the inventory was not admissible to show the number of jars on hand at that time, as the witness testified that he took it from the stock book. If we assume that the stock on hand taken by Greenstein and entered upon the stock book was so taken and entered in the usual course of his employer's business and in the performance of his duties, still, aside from the St. of 1913, c. 288, the stock book would not be admissible. It is not contended by the plaintiff that the slips were made by the witness or that he had any personal knowledge of the entries thereon. It was settled by this court long before the passage of the statute that items in a book of account made from slips and entered by a clerk who had no personal knowledge of the transaction as shown upon the slips are inadmissible. *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 569. *Gould v. Hartley*, 187 Mass. 561. *Kent v. Garvin*, 1 Gray, 148.

2. When the inventory was offered by the plaintiff, the trial judge * said: "I am not sure, however, but what it is admissible under the statute." The defendant's counsel at that time stated in substance that it did not seem to him that the evidence was admissible under the statute and duly saved an exception. We are of opinion that the evidence was not admissible under the St. of 1913, c. 288. While this statute is a rule of evidence, it applies only to "an entry in an account kept in a book or by a card system or by any other system of keeping accounts." This statute, undoubtedly, was passed to change the law as laid down in *Kent v. Garvin* and similar cases that followed, and simply to relieve against the hardships sometimes experienced in making proof in accordance with the law there laid down. This language confines the operation of the statute to an entry in an account, using the word "account" in the sense of a series of charges for merchandise or other matter ordinarily the subject of a book account. The statute did not enlarge the kind of evidence which could be proved by books of account which heretofore was admissible when supported by the evidence of all parties to the entries in the

* *Hitchcock, J.*, before whom the case was tried without a jury. He found for the plaintiff in the sum of \$2,420 with interest from the date of the writ; and the defendant alleged exceptions.

book account. The reason why the entries in *Kent v. Garvin* were held incompetent was because they had been transferred to the book by a clerk, from entries or memoranda kept by another person, who was not called as a witness to support his entries and deliveries of the articles so charged. The statute authorizes the court to admit as evidence such entries if it is found that they were made in good faith, and in the regular course of business, and before the beginning of the proceeding. It is to be observed that the statute applies to "An entry in an account . . . book."

3. The plaintiff called as a witness in his behalf his son, Benjamin J. Kaplan, who testified with reference to Exhibit 6 (the inventory above referred to) that before the contract between the parties was made "he talked with the defendant concerning the quantity of jars on the premises and showed the jars and the inventory, Exhibit 6, to the defendant on the premises and discussed their value and quantity with him, and that the whole matter was gone over with the defendant before said contract was made." We are of opinion that, if this testimony was believed by the judge, it was evidence of an admission by the defendant that the inventory correctly described the number of fruit jars on hand when it was taken, but that did not make the inventory admissible, for the reason that the evidence did not have the same probative force and value as an admission that it would have had if admitted under the statute; besides there is nothing to show that the presiding judge believed the testimony offered to show an admission on the part of the defendant. It follows that the exception saved to the admissibility of the inventory was not affected by the subsequent evidence tending to show an admission by the defendant.

4. The defendant also excepted to the ruling by the trial judge that the witness Greenstein could refer to a paper entitled "Stock list taken on August 27th, 1912, by S. F. G.," to refresh his recollection. The witness testified that the paper represented stock taken by him on that date, and that as to the jars packed in the bins, he did not count them but took the record from the stock book that he had at that time and kept. This paper, if it was not the inventory, so called, and above referred to, or a copy of it (which does not clearly appear from the bill of exceptions), was made up in the same manner as the stock book from which the

inventory was taken; that is to say, it was made up in part from slips, the entries upon which the witness never had any personal knowledge of, so that it is obvious that the paper included items that could not have refreshed his memory. A witness cannot be allowed to refer to a paper to refresh his recollection with reference to a matter about which he never had any knowledge. Of course a witness may inspect a writing to refresh his recollection although it may be a copy or made by some one else if it aids his memory in testifying to facts, and such writing may be so used, although it does not refresh the recollection of the witness as to the circumstances of the particular occasion, if he is able to say from an inspection of such writing made by him that the facts are as therein stated. *Mayberry v. Holbrook*, 182 Mass. 463. *Commonwealth v. Burton*, 183 Mass. 153, 158. *Holden v. Prudential Ins. Co. of America*, 191 Mass. 461, 470.

The entry must be

Exceptions sustained.

W. R. Scharton, (*J. H. Maguire* with him,) for the defendant.

W. Charak, for the plaintiffs.



JOSEPH B. SPEAR, administrator, vs. MARCELLUS COGGAN & another.

Suffolk. November 12, 1915. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Lis Pendens. *Equity Jurisdiction*, For an accounting, Defence of pending action at law. *Election.* *Equity Pleading and Practice*, Decree.

In a suit in equity against an administrator upon the termination of a trust to compel an accounting and the payment of the trust fund to the parties entitled to it, it is a defence that the plaintiff has brought an action of law against the defendant for the same cause of action which still is pending; but the court of equity, instead of dismissing the bill outright by reason of the pendency of such an action, will give the plaintiff a chance to elect whether he will proceed at law or in equity, and will order in substance that the bill be dismissed unless within a reasonable time the plaintiff shall discontinue his action at law.

RUGG, C. J. This is a suit in equity which in substance, as amended, sets out the establishment by parol of a trust for the benefit of the plaintiff's intestate, the remainder to be paid to her estate at her decease, the receipt and administration of it by the defendant's intestate, a failure finally to account for it by him, the possession of the fund by the defendant and a refusal by him to account for it or to pay to the plaintiff on demand; with prayers for appropriate relief. There is an allegation in the bill to the effect that the plaintiff brought an action at law against the defendant for the same cause of action which is still pending. The defendant demurred on the ground of the pendency of the action at law. The demurrer was sustained and a final decree was entered * dismissing the bill. The plaintiff's appeal brings the case here.

No discussion is required to show that the substantive averments of the plaintiff's bill set out a cause for relief in equity. The compelling of a proper accounting for the administration of a trust and payment to the parties entitled to it at the termination of the trust is a well recognized branch of equity.

There is nothing in the record to indicate that relief is open to the plaintiff at law which is not equally available, together with other advantages, in equity. This is not a case where there are alternative remedies at law and in equity, or where the relief sought in the two forums is inconsistent one with the other. Nor are they different means of enforcing a single right, as in *Frost v. Thompson*, 219 Mass. 360, 369. This is not a case of doubt as to the right remedy, where the prosecution of different proceedings for relief may go forward simultaneously. See, for example, *Corbett v. Boston & Maine Railroad*, 219 Mass. 351; *Worcester v. Worcester Consolidated Street Railway*, 182 Mass. 49. But it is a plain case where the plaintiff ought to pursue one or the other, but not both. While the technical stringency of the common law against the concurrent pendency of two different proceedings founded on the same cause of action no longer prevails, manifest justice requires that a defendant ought not to be harassed by useless litigation.

The pendency of an action at law for the same cause would be

* In the Superior Court by order of *Morton, J.*

taken advantage of by a plea in abatement if another action at law were brought. *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299. During the pendency of an action at law for the same cause in the same jurisdiction, a court of equity will not ordinarily try the same issues between the parties. A court of equity will not permit a defendant to be vexed at the same time with two suits for the same cause of action. Where an action at law is pending for the same cause, relief is open to the defendant by plea setting up the facts. As the pendency of the action at law is averred in the instant bill, the court takes notice of it on demurrer. *Sears v. Carrier*, 4 Allen, 339. But commonly it will not peremptorily sustain a demurrer, or a plea in bar, for this reason. A chancery court should give reasonable opportunity for the plaintiff to elect whether to proceed at law or in equity. Doubtless he usually, if not always, would be allowed to elect his equitable remedy, if he saw fit to do so. *Connihan v. Thompson*, 111 Mass. 270. *Manufacturers' Bottle Co. v. Taylor-Stites Glass Co.* 208 Mass. 593, 596. *McGunn v. Hanlin*, 29 Mich. 476, 480. *Way v. Bragaw*, 1 C. E. Green, 213, 217. As pointed out in *Sandford v. Wright*, 164 Mass. 85, the order of the Superior Court should have been in substance that the demurrer be sustained, unless within a reasonable time the plaintiff discontinued the action at law.

Let the entry be

Decree reversed. Demurrer to be sustained and bill dismissed, unless, within ten days from the entry of this rescript, the plaintiff discontinues his action at law. If such discontinuance is made, then this suit to stand for further hearing.

H. B. Roberts, for the plaintiff.

G. L. Dillaway, for the defendants.

IVORY F. FRISBEE vs. PRUSSIAN NATIONAL INSURANCE COMPANY.

Suffolk. November 12, 1915. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Pleading, Civil, Demurrer, Declaration. Insurance, Fire.

Under R. L. c. 173, § 16, cl. 2, an averment in the causes assigned for a demurrer, that the declaration does not state a legal cause of action substantially in accordance with the rules contained in R. L. c. 173, is sufficient as a general demurrer.

A declaration in an action of contract alleged that the defendant issued a policy of fire insurance to a certain person upon articles of personal property to the amount of \$500 payable in case of loss to another person and the plaintiff as their interest might appear, that the plaintiff had a pecuniary interest in the articles by reason of a mortgage given to him by the insured, that thereafter a fire "destroyed and damaged certain articles covered by said policy of insurance . . . ; that all the conditions . . . set forth in said policy of insurance have been complied with; and the plaintiff alleges that he is entitled to recover the value of the goods destroyed and damaged by said fire to the amount of \$148.75." There was no allegation to indicate what interest, if any, the other payee had in the proceeds due under the policy and no allegation of the total value of the goods covered by the policy that had been destroyed or damaged, and it did not appear whether the interest of the other payee in the proceeds of the policy had priority over the claim of the plaintiff or whether recovery by the plaintiff would be a bar to a claim by such other payee. Upon a demurrer it was *held*, that the declaration did not state concisely and with substantial certainty the substantive facts necessary to constitute a cause of action as required by R. L. c. 173, § 6, cl. 2, and the demurrer was sustained.

CROSBY, J. The plaintiff, having waived his exceptions to the order of the Superior Court denying his motion that the defendant be ordered to file an answer and to the order that judgment be entered for the defendant, and judgment having been entered for the defendant in accordance with the order, the case is before us upon two appeals of the plaintiff: (1) From the order of the Superior Court * sustaining the defendant's demurrer on the first and second assignments; and (2) from the order of the Superior Court * allowing a motion that judgment be entered for the defendant.

The plaintiff's appeal from the judgment entered in the Su-

* Made by *Jenney, J.*

perior Court involves the correctness of the order sustaining the demurrer upon the first and second assignments. As the demurrer was overruled upon the third and fourth assignments therein stated, they are not before us. The first and second assignments set forth in the demurrer are as follows:

"1. Said declaration does not set out a cause of action substantially in accordance with the provisions of R. L. c. 173.

"2. Said declaration does not state concisely and with substantial certainty the substantive facts necessary to constitute a cause of action."

The contention of the plaintiff that the demurrer is insufficient because it does not point out specifically the particulars in which the alleged defect consists (R. L. c. 173, § 16, cl. 2) cannot be sustained as these assignments go to the entire ground of action as stated in the declaration and not to any specific defect. Averments in a demurrer that the matters alleged do not set out a legal cause of action are sufficient without further particulars. *Chenery v. Holden*, 16 Gray, 125. *Steffe v. Old Colony Railroad*, 156 Mass. 262.

The declaration alleges "that the defendant made to one Agnes Fagan a policy of insurance against loss or damage by fire to the amount of \$500 on articles of personal property . . . and payable in case of loss to Mandy Fantt and Ivory F. Frisbee [the plaintiff] as their interest may appear." It is further alleged that the plaintiff had a pecuniary interest in the articles by virtue of a mortgage given to him by Fagan, and that thereafter a fire "destroyed and damaged certain articles covered by said policy of insurance . . . ; that all the conditions . . . set forth in said policy of insurance have been complied with; and the plaintiff alleges that he is entitled to recover the value of the goods destroyed and damaged by said fire to the amount of \$148.75, as set forth in schedules A and B."

The declaration sets out a joint liability from the defendant to the plaintiff and Mandy Fantt, and then alleges that he alone is entitled to recover for the amount therein stated.

The plaintiff and Fantt are alleged to be payees under the policy "as their interest may appear." There is no allegation in the declaration to indicate what interest, if any, Fantt has in the proceeds due under the policy, and no allegation of the total value of the

goods covered by the policy and destroyed or damaged, nor does it appear whether the interest of Fantt in the proceeds of the policy is prior to the claim of the plaintiff, or whether recovery by the plaintiff will be a bar to any claim by Fantt. If she has no interest, that fact should be alleged.

If the defendant must answer to the plaintiff in this action, there are no facts alleged to show that it may not be subjected to another action brought by Fantt. The averment that "the plaintiff alleges that he is entitled to recover the value of the goods destroyed and damaged by said fire to the amount of \$148.75" is not a statement of a substantive fact; it is merely a conclusion of law. *Murdock v. Caldwell*, 8 Allen, 309.

We are of opinion that the declaration does not state concisely and with substantial certainty the substantive facts necessary to constitute a cause of action, and is clearly demurrable for the first and second causes assigned. *Shawmut Mutual Fire Ins. Co. v. Stevens*, 9 Allen, 332. *Downs v. Hawley*, 112 Mass. 237, 241. *Barlow v. Nelson*, 157 Mass. 395. *Gosline v. Albro Clem Elevator Co.* 174 Mass. 38.

Judgment affirmed.

J. M. Browne & J. T. Maguire, for the plaintiff.

B. G. Davis, for the defendant.

LILLIAN M. HOBART vs. BRADFORD WESTON & others.

Plymouth. November 19, 1915. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Nantasket Beach. Boundary. Evidence, Plans. Words, "Extended."

A certain strip of land at Nantasket Beach in the town of Hull between the eastern side of Franklin Street and the ocean is free from a restriction prohibiting the erection of any structures thereon, except the portion of such strip of land which is on the easterly side of Beach Avenue, and that avenue extends southerly to the line of the southerly side of Quincy Street produced, the part of the premises between Beach Avenue and the ocean being subject to the restriction that no building or structure shall be placed or erected thereon and that it "shall be forever kept open and unobstructed for public use and enjoyment."

A boundary which was a part of the description of a parcel of land in a deed and was designated as running "by the southerly line of" a certain street "extended," was held properly to have been found not to indicate that the street itself existed at the place of the extended line but merely to describe the line that would exist if the street should be extended at that place.

It is within the discretionary power of a presiding judge to refuse to admit in evidence a plan which he finds to be imperfect. In the present case the plan excluded, if it had been a proper one, would in no way have been material to the issues being tried.

PETITION, filed in the Land Court on June 25, 1913, for registration of the petitioner's title to a strip of land at Nantasket Beach in the town of Hull lying between the easterly line of Franklin Street and the ocean and including the beach and flats to low water mark.

The case was heard by *Corbett, J.*, whose rulings and findings are stated in the opinion. He made the decree there described; and the respondents alleged exceptions.

On page 163 is printed a reduced copy of the material part of the 1885 plan of the lands of the Nantasket Company which is mentioned in the opinion. In this copy the figures giving the dimensions of the lots and the number of square feet are omitted for the sake of simplicity.

T. H. Buttimer, for the respondents.

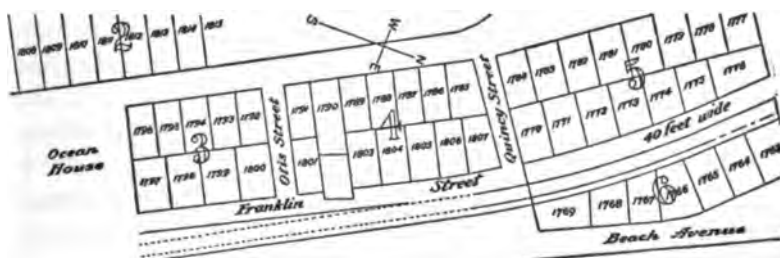
C. L. Newton, (*G. E. Curry* with him,) for the petitioner.

CARROLL, J. 1. This is a petition to register the title to a parcel of land situate between Franklin Street and low water mark on the ocean in the town of Hull. A decree was entered for the petitioners subject to the rights of the public below mean high water mark, and also subject to all rights legally existing in the town of Hull, referred to in St. 1811, c. 56. See *Ripley v. Knight*, 123 Mass. 515. The case is before us on the exceptions of the respondents.

In 1881 the Nantasket Company, a voluntary association, owned a large tract of land extending substantially from the Ocean House on the south, in that part of Hull known as Surfside, to Allerton Hill on the north, from the ocean on the east to the bay on the west. The Nantasket Company prepared a plan showing the tract divided into lots with streets and avenues. This plan was in sections, one showing substantially the northerly half and the other the southerly half of the tract. These sections were

dated 1881 and 1885, respectively, and were recorded in the Plymouth registry of deeds before June 21, 1886.

Beach Avenue was shown in the 1881 and 1885 plans, extending along the upland on the ocean front; no lots were shown on the plans on the easterly side of Beach Avenue, that is to say, between Beach Avenue and the ocean. The lots shown in the 1881 plan were numbered from 1 to 1237, inclusive, and the lots in the 1885 plan were from 1238 to 1815, inclusive. The title to the land shown on these plans, including the locus, remained in the Nantasket Company until 1886, when the land, including that lying on the ocean front and not divided into lots, was advertised for sale at public auction under a decree of the court, the sale to begin



June 21, 1886, and continue until the entire holdings of the Nantasket Company were disposed of.

The advertisement of the sale published at the time, copies of which were circulated at the sale, contained this statement: "All lots sold on the Easterly side of Beach Avenue will be conveyed subject to the express condition that no building or structure of any kind or nature whatsoever shall ever be placed or erected thereon or on any part thereof, but that the same shall forever remain open and unobstructed for public use and enjoyment." The land lying between Beach Avenue and the ocean, opposite the lots on the westerly side of Beach Avenue, was sold at this time, and each deed contained the same restriction stated in the advertisement. All the deeds referred either to the plan of 1881 or that of 1885. At this sale in August, 1886, John Shepard became the purchaser of all the premises in the locus sought to be registered, except that portion of the beach and upland lying between the north and south lines of Quincy Street and the north and south lines of Otis Street, extended, to low water mark. This portion

of the land between the lines of Quincy Street extended and Otis Street extended, was purchased at a sale by Eben D. Jordan, to whom was conveyed all the remaining land of the Nantasket Company. The deed to Shepard was subject "to the express condition that no building or structure of any kind or nature whatsoever shall be placed or erected thereon or on any part thereof, but the same shall be forever kept open and unobstructed for public use and enjoyment." The deed to Jordan contained the recital that so much of the premises as were between Beach Avenue and the ocean were subject to this restriction. The two parcels between the lines of Quincy and Otis streets, extended, passed by mesne conveyance to the petitioner, and these deeds were subject to the stipulation contained in the deed to Jordan. The title to the remainder of the locus is in the petitioner under mesne conveyances from Shepard. All these mesne conveyances of the parcel originally conveyed to Shepard were also subject to the same conditions and reservations, as stated in the original deed to Shepard.

In 1912 Andrew F. Reed, sole surviving trustee of the Nantasket Company, undertook to convey to the petitioner the parcels described in the deed to Shepard, the deed to Reed stating that the condition, that no building should ever be erected on the premises contained in the deed to Shepard, was inserted by accident and mistake. Subsequently Reed and the petitioner brought a petition in the Supreme Judicial Court, naming the Attorney General and the Commonwealth as the sole respondents, alleging a mistake in the conveyance to Shepard and praying for its reformation. In September, 1914, the deed was reformed by striking out the condition and ordering that "said deed shall be held construed and regarded as having conveyed the estate free from said condition."

The respondents are owners of lots on the north of the locus. They contend that Otis and Quincy streets and Beach Avenue extend across or into the locus and that the portion of the premises on the ocean front easterly of Beach Avenue so extended, must be registered subject to the restriction "that no building or structure of any kind or nature whatsoever shall be placed or erected thereon or any part thereof, but the same shall be forever kept open and unobstructed for public use and enjoyment."

The petitioner contends that her land extends to the northerly line of Quincy Street, extended, as her boundary on the north; that Beach Avenue does not extend on the south beyond this line and does not extend over her lot; that the condition prohibiting the erection of buildings applies only to land on the easterly side of Beach Avenue, and that Otis and Quincy streets extend no farther east than Franklin Street, which is her boundary on the west, and that they do not cross her land.

It is not disputed that the conveyance to the respondents gave them the right to an open space between Beach Avenue and the ocean, the easterly side of the avenue being restricted in its use so that no buildings or structures should be erected thereon. *Attorney General v. Onset Bay Grove Association*, 221 Mass. 342. *Hobart v. Towle*, 220 Mass. 293. *Massachusetts Institute of Technology v. Boston Society of Natural History*, 218 Mass. 189. *Whitney v. Union Railway*, 11 Gray, 359. The stipulations in the various deeds impose no such restriction except upon the land situate upon the easterly side of Beach Avenue, with the exception stated in the deed from the Nantasket Company to Shepard.

The Land Court found that Beach Avenue ends at the southeast corner of lot 1769, or at the northerly line of Quincy Street extended. There was no evidence showing how far to the south Beach Avenue was used for travel, nor is there anything showing the layout of the avenue. The deeds to the purchasers make no reference to its extent. All the deeds, however, refer to the plans of 1881 and 1885. These plans show that Beach Avenue ends at the southerly line of Quincy Street extended, the line marking the easterly boundary of the avenue extending south to a point where it meets the southerly line of Quincy Street extended. If this last mentioned line appeared on the plan, it would be plain that Beach Avenue extended thereto. And even without this continuation of the Quincy Street line, we see no reason why the line of the avenue was carried to this point, except for the purpose of showing its southerly extension. This boundary line of the avenue was inserted to show its width and extent, and, as we construe the plans, Beach Avenue does not end at the northerly line of Quincy Street, but does end at the southerly line of that street extended. These plans show that the locus was not divided into

lots, as was the remaining property of the grantor on the west of Beach Avenue, and there is nothing on either plan showing the avenue extending over or into any part of the petitioner's estate, except that portion lying between the north and south lines of Quincy Street extended. A reference to the plan shows that Beach Avenue in location and extent was as there shown and outlined. We think the Land Court was right in deciding that the conditions or restrictions had reference only to the land on the easterly side of Beach Avenue.

2. The deed to Shepard from the Nantasket Company makes no reference to Beach Avenue. So far as the record shows, the only land purchased by him from the Nantasket Company was the two parcels described in this deed, and, according to its language, he could place no building or structure thereon, or on any part thereof. Still, there is nothing in this language which imposes a restriction on this land for the benefit of the estates of the respondents (*Clapp v. Wilder*, 176 Mass. 332), although all the land purchased from the Nantasket Company by Shepard was thus restricted. In a sale extending over such a length of time and referring to so many lots, it is not difficult to see how by mistake or accident such a restriction was inserted, which rendered his land of little if any value to him. Even if there was no mistake there is nothing in the terms of the grant to show, "from the situation and surrounding circumstances, that it was the intention of the grantor in inserting the restriction to create a servitude or right which should enure to the benefit of" the respondents' land, or should be annexed as an appurtenance (*Beals v. Case*, 138 Mass. 138, 140), the only restriction enuring for the benefit of the respondent's land being that referring to Beach Avenue.

Neither was there any dedication of this land to the public under the clause "to be forever kept open and unobstructed for public use and enjoyment." See *Attorney General v. Vineyard Grove Co.* 211 Mass. 596; *Boston Water Power Co. v. Boston*, 127 Mass. 374; *Pearson v. Allen*, 151 Mass. 79; *Attorney General v. Whitney*, 137 Mass. 450; *Bowers v. Suffolk Manuf. Co.* 4 Cush. 332. And there is nothing in *Attorney General v. Abbott*, 154 Mass. 323, in conflict with what is said here.

3. The deed to Jordan conveyed all the remaining estate belonging to the Nantasket Company. It contained the recital that

so much of the premises as were between the ocean and Beach Avenue were subject to the same reservation before mentioned as did the deed from Jordan to Shepard which transferred the title to the land between the lines of Otis and Quincy streets, extended. As Beach Avenue did not extend as far south as these streets extended, except in the case of Quincy Street above referred to, the respondents cannot insist upon a reservation in the grants which were not for the benefit of their estates; what we have said before in considering the extent of this avenue and the restrictions applies to the grant from Jordan to Shepard.

4. The deed conveying lot 1769 to Elijah A. Marsh, through whom the respondent Bradford Weston derives title by mesne conveyance, described the premises as bounded southerly by the northerly line of Quincy Street extended, 49.80 feet. In the deed to Shepard, one parcel is bounded by the southerly line of Otis Street extended easterly to low water line and by the northerly line of the Ocean House estate extended. The other parcel is bounded by the southerly line of Quincy Street, extended; from this it is argued that Otis and Quincy streets extend over the locus to the ocean. The judge found against this contention and ruled that the streets were not extended by the language of the deed; that the words used were used in the same sense as the words, "line of Ocean House estate extended" were used, not to show that the streets went beyond Franklin Street, but merely to show where the lines would fall on the ground, if the streets were thus extended. On the plans these streets do not pass over the land of the petitioner, the title to which is sought to be registered. We see no error in this finding.

5. The respondents offered a plan made in 1878 by the predecessor in title of the Nantasket Company. The judge declined to receive it. This plan was known as the South Commons plan. It was recorded in the registry of deeds for Plymouth. It showed Beach Avenue running north and south along the ocean and two streets called Twenty-sixth and Twenty-seventh streets. The respondents offered to show that Twenty-sixth Street, as shown on this plan, was in the same location as Quincy Street shown on the plan of the Nantasket Company. The judge found that the plan offered did not show a subdivision of the locus, that Twenty-sixth and Twenty-seventh streets did not coincide with Quincy

and Otis streets. This was a question of fact. As stated by Mr. Justice Lathrop, in *Whitman v. Shaw*, 166 Mass. 451, 458: "It is undoubtedly true that a plot, map, or plan may be so imperfect that the judge presiding at the trial may be justified in declining to admit it." Even if the judge was wrong in this finding, or in the ruling excluding the evidence showing the location of Twenty-sixth and Quincy streets to be the same, there was no evidence that the plan of the South Commons did show Beach Avenue extending through the locus. No reference was made to this plan at the time of the sale, nor in the deeds to the various respondents. They received their title under deeds which specifically referred to the plans of 1881 and 1885, and these plans showed Beach Avenue extending only to the southerly line of Quincy Street extended. Under the facts disclosed in this record, the rights of the parties cannot be affected by what a former owner may have contemplated, even if it was his intention to extend Beach Avenue along the ocean in front of the premises he then owned.

The conclusion as to points 1 and 2 of this opinion is by a majority of the court. The decree of the Land Court should be modified, by showing that Beach Avenue extends to the southerly side of Quincy Street extended, and that the portion of the locus on the easterly side of Beach Avenue, thus extended, is subject to the restrictions mentioned, and, so modified, the order for the decree is affirmed.

So ordered.

LOWELL TRUST COMPANY *vs.* ESTHER WOLFF.

Middlesex. January 10, 11, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Agency, Scope of authority, Existence of relation. *Husband and Wife*. *Evidence*, Relevancy and materiality, Competency. *Practice*, Civil, Conduct of trial: order of proof.

At the hearing by a judge without a jury of an action by a bank against a married woman upon a promissory note signed with a firm name containing the name of the defendant's husband, there was evidence that, previous to a certain date, the husband had had a bank account with the plaintiff on which he drew checks signed with the firm name; that, fearing that his property was to

be attached, he conveyed to his wife all his real and personal property, including his business and bank account; that the defendant signed and recorded a married woman's certificate stating that she proposed to carry on a business, of the same description as that of her husband, under her own name; that on the same day the husband delivered to the plaintiff two cards, one signed by the defendant and authorizing her husband to "sign and indorse checks, notes and drafts, accept drafts, and transact all business with your bank in my name, as my attorney," and the other signed by the husband giving, as the authorized signature for the defendant's account with the plaintiff, the old firm name; that on the same day the defendant opened an account with the plaintiff under her own name; that thereafter for six and one half years the defendant's account remained with the plaintiff; that it was active, that checks signed in the old firm name were paid out of it, that deposits made in the old firm name were credited to it, and that notes signed by the husband in the old firm name were discounted by the plaintiff and the proceeds were placed to the credit of the account. There also was evidence that during this period the defendant lived in the yard where the business was carried on, gave orders to employees on the premises and directed what should be done as to the real estate. *Held*, that a finding was warranted that the defendant had authorized her husband to carry on the business, formerly his, for her, and that the note in suit was signed by him by her authority with a firm name under which she was doing business.

It also was *held* that, at the trial above described, daily balance books of the plaintiff were admissible, not only to show the state of the defendant's account, but also to show that the proceeds of the notes in suit, when they were discounted, were credited to the account of the defendant.

Under the foregoing circumstances, also, there being ample evidence other than statements by the husband to establish his agency for the defendant, evidence of statements of the husband to the effect that, after the opening of her bank account, the defendant would carry on the business under the old firm name but that the account at the bank would be in her individual name, were admissible, they not being testimony by an agent to establish his agency, but being testimony by the husband that he was not carrying on the business, but that his principal, the defendant, was.

The determination of the order of proof at a trial is within the discretion of the trial judge.

At the same trial, envelopes handed monthly by the plaintiff to the defendant's husband during the six and one half years that the account remained with the plaintiff, bearing the name of the defendant as a customer of the plaintiff with a statement of the monthly account and containing cancelled checks paid from the account and signed in the old firm name, were held to be admissible as independent evidence that the defendant carried on business under the old firm name.

The mere fact that a married woman signed and recorded a certificate under R. L. c. 153, § 10, that she proposed to do business on her separate account at a certain number on Howard Street in a city under her name, "E. Wolff," does not make illegal a business thereafter conducted by her without the recording of a new certificate at Apple Street in the same city under the name, "A. Wolff & Co.," which was a business name formerly used by her husband, although her failure to record a new certificate might make her husband liable upon contracts lawfully entered into by her in the prosecution of such business.

CROSBY, J. This is an action of contract brought to recover upon certain promissory notes. Abraham Wolff, the defendant's husband, for some years before November 18, 1905, carried on a scrap iron and metal business at Lowell under the name of A. Wolff Company, and had a bank account with the plaintiff in the name of A. Wolff, on which he drew checks signed A. Wolff Company. This account was closed on December 4, 1905. The record recites, and the judge of the Superior Court,* before whom the case was tried without a jury, found that "On November 18, 1905, being afraid that his (A. Wolff's) property was to be attached, he conveyed to his wife, this defendant, all his property, real estate, business and bank account." On that date the defendant went to the office of an attorney where the real estate was transferred to her by her husband, and at the same time she signed a married woman's certificate in which it was stated that she proposed to carry on the business of dealer in scrap iron and metal at wholesale under the name of E. Wolff. The certificate was dated and recorded November 18, 1905. On the same day the defendant's husband delivered to the plaintiff two postal cards, one of which was signed by the defendant by her mark and contained the following recital: "Below is the signature of Mr. A. Wolff, who is hereby authorized to sign and indorse checks, notes and drafts, accept drafts, and transact all business with your bank in my name, as my attorney." The other postal card was filled out and signed by the defendant's husband. It was known as a firm signature card. It indicated that the authorized form of signature for the defendant was "A. Wolff & Co." and that "Mr. A. Wolff & Co. will sign." An account was opened in the plaintiff's bank on the same day in the name of E. Wolff, the defendant, and was carried on the books of the bank until 1912 when the defendant's husband was adjudicated a bankrupt. During all this period it was a continuous and active account, and checks signed by A. Wolff & Co. in the handwriting of the defendant's husband were paid out of the account. All deposits made by A. Wolff & Co. were credited to the account of E. Wolff, and all notes discounted at the bank by the defendant's husband from 1906 to 1912, with one exception, were signed by A. Wolff & Co., and all notes signed by

* *Brown, J.*, who found for the plaintiff in the sum of \$6,185.17. The defendant alleged exceptions.

A. Wolff & Co. were so signed by the defendant's husband and discounted by the plaintiff, and the proceeds credited to the account of E. Wolff.

The defendant denies that she carried on business at any time as A. Wolff & Co., or that she is liable upon the notes. She contends that she was carrying on the business from November 18, 1905, until November, 1906, under the name of E. Wolff, and that in November, 1906, the business was transferred by her to her husband and afterwards carried on by him.

1. The trial judge found that the defendant was carrying on the business from November 18, 1905, to June, 1912; that her husband was her duly authorized agent for that purpose and was empowered by her to sign checks and notes in the name of A. Wolff & Co. in the conduct of the business. The judge also found that the notes sued upon were given in renewal of previous notes that had been discounted by the plaintiff and placed to the credit of the defendant in the account of E. Wolff.

We are of opinion that these findings, if not required, were well warranted. Aside from the evidence above referred to, which would justify the inference that the business was being carried on by the defendant under the name of A. Wolff & Co. with her full knowledge and consent, there was other evidence to show that the business was conducted by her until her husband was adjudicated a bankrupt in 1912; there was evidence that she lived in the yard where the business was carried on, that she gave orders to the men at work on the premises, that she directed what should be done with reference to the real estate, and generally attended to whatever was necessary to be done.

We are of opinion that the trial judge was justified in finding that during this period the authority given by the defendant to her husband was not limited to signing checks, but that she also authorized him to sign notes in the name of A. Wolff & Co., and that, when she took the title to all his property, both real and personal, including the business and bank accounts to prevent the property from being attached by his creditors and filed a married woman's certificate, she authorized him to carry on the business for her. *Tozier v. Crafts*, 123 Mass. 480. *Nowell v. Chipman*, 170 Mass. 340. She admits that the business was hers during the year following November 18, 1905, but claims that she

turned it over to her husband at the end of that time, he in the meantime having settled with one of his creditors, as he testified, who "had threatened to attach." The judge was not bound to believe her testimony or that of her husband, but was justified in finding that there had been no such change in the ownership of the business.

2. The daily balance books of the bank were admissible not only to show the state of the defendant's account, but particularly as bearing upon the question of the consideration of the notes, to show that the proceeds were credited to the defendant.

3. The defendant's exception to the testimony of the plaintiff's actuary Connors that the defendant's husband told him on November 18, 1905, that the defendant would thereafter carry on the scrap iron and metal business under the name of A. Wolff & Co. but that the account was to run under the name of E. Wolff, cannot be sustained as there was independent evidence to show that he was authorized to act as her agent. *Deane v. American Glue Co.* 200 Mass. 459, 462. The order of proof in which the agent's declaration may be admitted is within the discretion of the court. *Sanford v. Orient Ins. Co.* 174 Mass. 416, 422. While, of course, agency cannot be established by declarations of the agent, still they are admissible to prove that the agent believed himself to be the agent of a particular principal and so held himself out, and that the third person dealt with him as such in good faith. *Nowell v. Chipman*, 170 Mass. 340. 2 C. J. 940. The declarations of the defendant's husband were therefore admissible to show that he was not carrying on the business on his own account after November 18, 1905. Upon the same ground, the testimony of the witness Banks to the effect that the defendant's husband told him (Banks) that "the business was run by her, but she allowed him to run A. Wolff & Co." was admissible.

4. The envelopes * containing cancelled checks delivered by

* These envelopes were described in the bill of exceptions as "certain envelopes or statements which had been handed by the bank to the defendant's husband monthly from November, 1905, until the time of his bankruptcy in 1912. All of these envelopes contained cancelled checks, paid from the account standing in the name of E. Wolff, and bore upon them the following inscription: 'Lowell Trust Co., in account with E. Wolff,' also the words: 'Please examine above statement and enclosed checks promptly.'"

the plaintiff to the defendant's husband were admissible as showing that the plaintiff charged the checks given by A. Wolff & Co. to the account standing in the name of E. Wolff, the defendant, as there was independent evidence which justified the finding of the court that the business was carried on by the defendant under the name of A. Wolff & Co.

5. The certificate recorded by the defendant on November 18, 1905, under R. L. c. 153, § 10, described the place where she proposed to do business as at Nos. 104, 106, 110, 110½ Howard Street in the city of Lowell. The business was afterwards transferred to a place on another street in the same city and was carried on under the name, "A. Wolff & Co.," without recording a new certificate. The business so carried on at the latter place was not illegal even if the defendant's failure to record a new certificate subjected the personal property employed in such business to be attached and taken on execution for her husband's debts, and made him liable upon her contracts lawfully entered into in the prosecution of such business. *Desmond v. Young*, 173 Mass. 90.

As the findings of the judge of the Superior Court were amply justified upon the evidence, it follows that the rulings requested could not have been given, nor do we perceive any error in the admission of evidence or in the conduct of the trial.

Exceptions overruled.

S. E. Qua & A. S. Howard, (B. Silverblatt with them,) for the defendant.

J. J. Hogan, for the plaintiff.

JENNIE MCCARTHY vs. INHABITANTS OF STONEHAM.

Middlesex. January 11, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Way, Public: defect. *Negligence*, In use of highway. *Notice*.

At the trial of an action against a town for personal injuries caused by stumbling over a grade stake in a street undergoing repairs, it appeared that the plaintiff had entered and was crossing the street from another street that ran into it at right angles but did not cross it. There was no evidence that the street

was closed to public travel by any vote of the town authorities. There was evidence that there were no barriers or other obstacles warning persons entering the street as the plaintiff did, of whom there were many, that it was closed to public travel; that the grade stake was placed by employees of the defendant in the gutter; that, while the street was rough, it "wasn't so rough," but was passable, and that the accident happened at about a quarter before six o'clock on a very dark night in November. *Held*, that there was evidence warranting findings that the plaintiff was in the exercise of due care, that the street was not closed to public travel and that the defendant had failed in its duty to maintain the street in a reasonably safe condition for travellers.

Under the circumstances stated above it also was *held* that no question arose as to notice to the defendant as to the defect, because the stake was placed in the highway under the direction of the defendant's officials.

Where one, who was injured by a defect in a public way called M Avenue in a town, in his notice to the town under R. L. c. 51, § 20, states that "The place on said M Avenue where my said accident happened was at its junction with C Street," if the evidence at the trial of an action against the town to recover for the injuries tends to show that C Street entered but did not cross M Avenue, and that the plaintiff, entering M Avenue from C Street, crossed it and was injured by stumbling on a grade stake in the gutter on the side of M Avenue farther from C Street, it is proper for the judge to submit to the jury the question whether the notice was inaccurate, and, if it was, whether there was any intention on the part of the plaintiff to mislead the defendant and whether the defendant was misled.

It also was *held* that, in view of the proximity of the stake to the junction of M Avenue and C Street and of the evidence that it was placed there by authority of the defendant, under the circumstances shown a finding of the jury was warranted that the defendant was not misled by any inaccuracy in the notice.

CROSBY, J. This is an action to recover for personal injuries sustained by the plaintiff by reason of an alleged defect in a highway called Montvale Avenue in the town of Stoneham. Montvale Avenue runs in an easterly and westerly direction, and Chestnut Street runs into Montvale Avenue from the south but does not cross it.

The plaintiff testified that on the night of November 4, 1912, she was on the way to her home on Montvale Avenue, that she came down the westerly side of Chestnut Street, and, while crossing Montvale Avenue, she stumbled over an iron pin in the gutter on the northerly side of the street which was about six feet from a catch basin, and fell upon the sidewalk and was injured; that the accident happened about a quarter before six o'clock, and that it was very dark; that when she got up she saw the iron pin that caused her to fall.

There was evidence that at the time of the accident the north

side of Montvale Avenue was undergoing repair and that a portion of the street was dug up, and grade stakes, which consisted of iron pins about two feet long and about one half an inch in diameter, were driven in the gutter throughout the entire length of the portion of the street which was being repaired. The top of these stakes projected from two to three inches above the surface of the ground. The grade stakes were set for the purpose of getting the proper pitch of the road from the car track to the gutter. The evidence was conflicting as to when the stakes were set in the gutter at the place of the accident. The defendant offered evidence to show that they were not put there until two days after the accident. On the other hand, there was evidence from which the jury could have found that they were there at least three weeks before the plaintiff was hurt.

There is nothing in the record to show that the street was closed to public travel by any vote of the town authorities. There was evidence that barriers were placed at different points in the street and that lighted lanterns were maintained at night, but the jury could have found that there were no barriers or other obstacles to indicate to travellers that that portion of the street opposite its junction with Chestnut Street and across which the plaintiff travelled before she fell had been closed to public travel. The defendant's superintendent, who had charge of the work, testified that there were no barriers on Chestnut Street to prevent people from passing from Chestnut Street into Montvale Avenue at any time during the progress of the work. There was also evidence that there was a great deal of travel over Chestnut Street by pedestrians; that it leads to the station of the Boston and Maine Railroad, and that it was necessary to cross Montvale Avenue at some point to reach the station.

The jury * were warranted in finding upon the evidence that

* The case was tried before *Quinn, J.* The defendant requested the following rulings of law:

"1. On the evidence and pleadings in this case the plaintiff is not entitled to recover.

"2. There is no evidence that the plaintiff was in the exercise of due care.

"3. There is no evidence that the defendant was negligent.

"4. That the notice does not state the place where the accident occurred, as shown by the evidence, therefore there is a variance between the evidence as to where the accident occurred, and the place stated in the notice.

Montvale Avenue was not closed to public travel at the place where the plaintiff was injured. If so, the defendant was bound to maintain the street in a reasonably safe condition for travellers. *Hurley v. Boston*, 202 Mass. 68. *Torphy v. Fall River*, 188 Mass. 310.

The question whether, in view of the condition of the surface of the street, known to the plaintiff,* she was in the exercise of due care was for the jury. So, too, whether the iron pin or grade stake constituted a defect in the way was a question of fact for the jury. *Jones v. Collins*, 188 Mass. 53. *Adams v. Stoneham*, 193 Mass. 597. *Jones v. Boston*, 197 Mass. 66. *Gallagher v. Watertown*, 197 Mass. 467. The cases of *Martin v. Chelsea*, 175 Mass. 516, *Jones v. Collins*, 177 Mass. 444, and *Compton v. Revere*, 179 Mass. 413, cited by the defendant, are clearly distinguishable from the case at bar.

No question arises as to notice of the defect, if one existed, because, if the iron pin was placed in the highway, it was so placed under the direction of the officials of the defendant engaged in the work of repairing the way.

The defendant contends that there was a variance between the evidence and the notice served by the plaintiff upon the defendant as to the place of the injury. The notice recites that "the place on said Montvale Avenue where my said accident happened was at its junction with Chestnut Street." The evidence was that the place where the plaintiff fell was in the gutter on the north side of the street near a catch basin. The presiding judge properly submitted to the jury the question whether the notice was in fact inaccurate and if it was inaccurate whether there was any intention on the part of the plaintiff to mislead and whether the defendant was or was not in fact misled thereby. The judge cor-

"5. That, because of the variance between the evidence and the notice as to the place where the accident occurred, the plaintiff cannot recover."

"7. There is no evidence that the defendant was not misled, therefore your verdict must be for the defendant."

The requests were refused. The jury found for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

* The plaintiff testified in cross-examination "that Montvale Avenue was pretty rough, but it was passable, where she went through, it wasn't so rough; that the general condition of Montvale Avenue next to the concrete sidewalk was very bad; that she couldn't remember that it was all dug up."

rectly instructed the jury that the burden of proof was upon the plaintiff to show that the defendant was not misled. *Tobin v. Brimfield*, 182 Mass. 117, 120.

In view of the proximity of the iron pin, over which the plaintiff testified she fell, to the junction of Montvale Avenue and Chestnut Street, and the evidence that it was placed there by authority of the defendant, we are of opinion that the jury were warranted in finding that the defendant was not misled by any inaccuracies in the notice. It follows that the defendant's first, second, third and seventh requests could not properly have been given, and the entry must be

Exceptions overruled.

The case was submitted on briefs.

E. I. Taylor & J. W. Britton, for the defendant.

W. J. Corcoran, for the plaintiff.

GEORGE B. GONIA *vs.* FULTON O'BRIEN.

Middlesex. January 11, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSSBY, & PIERCE, JJ.

Practice, Civil, Interpleader. *Interpleader. Laches.*

The provisions of R. L. c. 173, § 37, authorizing an interpleader in an action at law, do not alter the settled doctrines applicable to bills of interpleader in equity. The provisions of R. L. c. 173, § 37, that if, in an action at law, the defendant admits his liability and the amount thereof is not disputed, but it appears that such amount is claimed by some other person than the plaintiff and that the defendant has no interest in the subject matter of the controversy, the court on a petition by the defendant may compel such claimant to interplead, do not give a defendant, in an action against him for services in the superintending of the erection of a building, a right as a matter of law to have such a petition granted and to have one whom he alleged was the plaintiff's principal compelled to interplead, where the defendant's petition is not filed until after a verdict has been rendered for the plaintiff upon issues raised by an answer of the defendant containing a general denial, an allegation of payment, and an allegation that, if the defendant ever made a contract as alleged, it was with the plaintiff as the agent or representative of his principal.

Nor does R. L. c. 173, § 37, give to a claimant a right as a matter of law to intervene in such an action after a verdict for the plaintiff.

DE COURCY, J. The motion of the defendant, that J. A. Bremner & Co. Incorporated be made a party claimant under R. L.

c. 173, § 37, was not filed until after there had been a trial in this action, resulting in a verdict for the plaintiff, and after suit had been brought by Bremner & Co. against the defendant.*

The claim was one for services rendered to the defendant in superintending the erection of a building. When the present action was brought, if the defendant admitted liability and if the amount due for the services was not disputed, but the money was claimed by the plaintiff and by J. A. Bremner & Co. Incorporated, the defendant might have availed himself of the interpleader statute, and allowed the plaintiff and claimant to litigate the controversy in which he, the defendant, had no interest. But he took no such position. On the contrary, in his answer he set up a general denial and a plea of payment. He further answered that if he ever made a contract as alleged, it was with the plaintiff as the agent or representative of the Bremner corporation. There was no admission of his liability to either of them for any amount. And with full knowledge of the facts he elected to go to trial, not as a mere stakeholder, but contesting his liability to the plaintiff.

The statute, authorizing this summary proceeding in actions at law, does not alter the settled doctrines applicable to bills of interpleader. "The statutory remedy is a mere substitute for the equitable remedy by suit, in the kinds of actions to which it applies, and is governed by the same rules." 1 Pom. Eq. Rem. § 61. *Worthington v. Waring*, 157 Mass. 421, 428. *Brierly v. Equitable Aid Union*, 170 Mass. 218. The stakeholder must use reasonable diligence to bring the contending claimants into court. He cannot delay his application until after an unsuccessful trial against one of them. *Provident Institution for Savings v. White*, 115 Mass. 112. *Moore v. Hill*, 59 Ga. 760. *Union Bank v. Kerr*, 2 Md. Ch. 460. *McKinney v. Kuhn*, 59 Miss. 186. *DeZouche v. Garrison*, 140 Penn. St. 430. *Haseltine v. Brickey*, 16 Grat. 116. In the case at bar the defendant's diffi-

* J. A. Bremner & Co. Incorporated also, after the verdict for the plaintiff, moved to be made a party to this action. Both motions were heard by *White, J.*, who refused to rule, as asked to do in numerous requests filed by the defendant and by J. A. Bremner & Co. Incorporated, in substance that as a matter of law the motions should be granted; and the defendant and J. A. Bremner & Co. Incorporated alleged exceptions and claimed appeals.

culty is even more fundamental than that of laches. Interpleader lies only when the party is exposed to several actions for the same demand, while he is ready and willing to satisfy that demand in favor of the claimant who establishes his right thereto, and he himself claims no personal interest in the subject matter of the litigation. Between the claimants he should stand indifferent. If he denies and contests the right of one of them to share in the money due, or if he has incurred a personal liability to either of them, independent of the question between the claimants themselves, he is not entitled to relief by way of interpleader. Its office is to protect a party, not against a double liability, but against a double vexation on account of one liability. *Fairbanks v. Bellnap*, 135 Mass. 179, 184. *Connecticut Mutual Life Ins. Co. v. Cook*, 219 Mass. 222.

The defendant was not entitled as matter of law to have J. A. Bremner & Co. Incorporated made a party, and there was no error in the refusal of the presiding judge to give the rulings requested.

The "appeals" bring nothing before us for consideration.

Assuming, without deciding, that the statute authorizes a claimant to invoke interpleader proceedings upon its own motion, the considerations already stated dispose of the exceptions and appeal of J. A. Bremner & Co. Incorporated. In each proceeding the entry must be

Exceptions overruled. Appeals dismissed.

W. R. Evans, Jr., for the defendant.

F. P. Garland, for the plaintiff.

VIDA S. WALKER, administratrix, vs. MARTINA A. GAGE.

SAME vs. SAME.

Middlesex. January 12, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Causing death, In use of highway. *Evidence*, Presumptions and burden of proof. *Death. Proximate Cause.*

At the trial of an action by an administrator for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by his having been run over at half past five o'clock on an afternoon late in November by an ice

wagon negligently driven by an employee of the defendant, there was evidence that the driver and the intestate were travelling on the same street toward each other and toward a point where a second street intersected the first at right angles, that the driver as he approached the second street quickened the pace of the horses; that the intestate, coming to the second street, hesitated before crossing it until he saw that the wagon was well across it and apparently was going to continue straight ahead past him on the first street; that then he started across the second street, but had gone only a few steps when the wagon suddenly swung around to turn into the second street and ran over him; that the driver kept on his way without stopping, and that a gas lamp at the corner was lighted. *Held*, that there was evidence of negligence of the driver and of the due care of the plaintiff's intestate required by R. L. c. 171, § 2, as amended by St. 1907, c. 375.

Where, at the trial of an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a man sixty-six years of age, it appears that the intestate was run over by an ice wagon driven by an employee of the defendant and there is evidence that at the time of his injury he was subject to periodical attacks of gall bladder disease and that the immediate cause of his death was blood poisoning resulting from the condition of the gall bladder, and experts testify that the accident lowered his vitality, set up an active inflammation, and impaired his power to resist the attacks, and that but for the accident he probably would have lived longer, the question, whether the death was caused by the accident, is for the jury.

TWO ACTIONS OF TORT, the first for conscious suffering and the second for the death of the plaintiff's intestate, Benjamin Hirst, alleged to have been caused by his being run over at half past five o'clock in the afternoon of November 23, 1910, by an ice wagon negligently driven by an employee of the defendant. Writs dated respectively March 18 and July 3, 1911.

In the Superior Court the cases were tried together before *Stevens, J.* The evidence is described in the opinion.

In the first action there was a verdict for the plaintiff in the sum of \$2,000, which later on a motion by the defendant for a new trial was reduced to \$1,200. The defendant alleged exceptions to a refusal by the judge to order a verdict in his favor.

In the second action the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

T. W. Proctor, (A. P. Sawyer with him,) for the defendant.

J. M. O'Donoghue, for the plaintiff.

DE COURCY, J. On the evening of November 23, 1910, about half past five o'clock, at or near the junction of Aiken and Perkins streets, in Lowell, the plaintiff's intestate, Benjamin Hirst, was run over and injured by a two-horse wagon, and there was ample

evidence that it was an ice wagon. It was owned by the defendant, and was being driven by one of her employees. In the action for personal injuries, brought by Hirst, there was a verdict for the plaintiff; and in the action later brought by the administratrix for his death the presiding judge directed a verdict for the defendant. The exceptions in both cases raise the questions whether there was evidence for the jury of the negligence of the driver and of the due care of Hirst. The further question in the second case is, was there evidence entitling the plaintiff to go to the jury on the claim that the accident caused the death of her intestate.

There was evidence on which the jury could find the facts to be as follows: Aiken Street runs in a southerly direction from the Merrimack River, and intersects Perkins Street at about a right angle. The ice wagon came southerly from the Aiken Street bridge, and the driver quickened the pace of the horses as he approached Perkins Street. Hirst, who was walking in a northerly direction on Aiken Street and was south of Perkins Street, saw the ice wagon coming toward him. When he reached Perkins Street he hesitated until he saw that the wagon was well across that street, and apparently was going to continue straight ahead on Aiken Street. He then started to cross Perkins Street but had taken only two or three steps when the ice wagon swung suddenly round into Perkins Street and ran over him. The driver proceeded on his way without stopping, and he testified that he saw no one near the crossing. The gas lamp at a corner of the two streets was lighted. On these facts, if believed, there was evidence for the jury of the due care of the deceased and of negligence on the part of the defendant's driver. *Hennessey v. Taylor*, 189 Mass. 583. *Crimmins v. Armstrong Transfer Express Co.* 217 Mass. 155.

The evidence that the accident caused the death of Hirst was somewhat meagre. He was a man sixty-six years of age, subject periodically to attacks of gall bladder disease, and the immediate cause of his death was blood poisoning resulting from the condition of the gall bladder. There was expert testimony, however, to the effect that the accident lowered his vitality, set up an active inflammation and impaired his power to resist the attacks; and that but for it he very probably would have lived longer.

There also was evidence of lessening vitality, suffering and loss of flesh after the accident. While in the hospital from November 23 to December 12, he suffered acute pain in the region of the back, where marks indicated the passing of the wheels over him. In our opinion there was evidence proper for the consideration of the jury that the accident hastened the death of Benjamin Hirst and caused it to occur sooner than it would have happened otherwise. That is enough legally to make the accident the proximate cause of his death. *Wiemert v. Boston Elevated Railway*, 216 Mass. 598. *Larson v. Boston Elevated Railway*, 212 Mass. 262. *Brightman's Case*, 220 Mass. 17. *Madden's Case*, 222 Mass. 487.

In the original action the defendant's exceptions must be overruled. In the death case the plaintiff's exceptions are sustained.

Ordered accordingly.

JOSHUA C. KELLEY vs. JONAS A. LARAWAY.

SAME vs. J. A. LARAWAY COMPANY.

Middlesex. January 13, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Of plumber.

It is the duty of a plumber, whom the owner of a house has employed to install a hot water boiler in his basement to be supplied by a hot water coil in a heater which is a part of a hot water heating system, and to whom the owner has left entirely the plan and execution of the work, to perform the work in a workman-like manner and with reasonable judgment, skill and care according to the approved usages of his trade.

In the present action, in which the owner of a house sought recovery from a plumber who was alleged to have failed to perform his duty as above described, it was held that there was evidence that the plumber had performed his work negligently, and that therefore it was proper to submit the case to a jury.

TWO ACTIONS OF TORT for damages resulting from the explosion on February 22, 1914, of a hot water boiler alleged to have been installed in a negligent manner in the basement of the plaintiff's dwelling by the defendant in the second action under the personal supervision of the defendant in the first action. Writs dated March 19, 1914.

The cases were tried together before Dana, J. The evidence

and the defendants' exceptions are described in the opinion. The jury found for the plaintiff in each action in the sum of \$2,819; and the defendants alleged exceptions.

J. J. Feely, (F. Joy with him,) for the defendants.

R. H. Sherman, for the plaintiff.

DE COURCY, J. The dwelling house was heated by a hot water system, known as a Mills heater. Originally the hot water for domestic purposes was obtained by means of an automatic gas appliance. In August, 1913, after the plaintiff had purchased the house, he installed therein a forty-gallon copper tank or boiler, the water in which was heated by means of a coil of pipe in the fire-pot of the Mills heater, and connected with the boiler. A relief or safety valve was attached over the set tub in the laundry. In December a ventilator was placed on the chimney, to increase the draft. Later the hot water from the copper boiler kept leaking out to the supply pipes and burning out the packing in the water meter; and, in accordance with the order of the town inspector, a check valve was inserted between the meter and the copper tank on February 19, 1914. On February 22, the copper tank exploded, causing the injuries complained of. The original plumbing and all of the work above mentioned was done by the defendant J. A. Laraway Company under the personal direction of the other defendant, Jonas A. Laraway. The two cases were tried together, and in both the cause of action, the facts and the verdict were the same. As there can be but one satisfaction, we shall refer alike to each as the defendant.

The case was submitted to the jury on these grounds of alleged negligence on the part of the defendant: first, that the coil of pipe installed in the Mills heater was too large for heating a forty gallon tank; second, that the safety valve had an outlet of one fourth of an inch while the inlet from the boiler was three eighths of an inch, and hence was not a proper and safe device in connection with the existing system; third, that the safety valve was not properly placed, in that it was near a window in the laundry, on the north side of the house, instead of on top of or near the hot water boiler or tank. It was further contended that the defendant was negligent in putting in the check valve, thereby shutting off one avenue of escape for the excessive steam, in view of the existing condition of the plumbing and his knowledge as to

the presence of steam and the rumblings in the pipes some days before the explosion.

There was considerable expert testimony in support of and opposed to these several contentions, and the issue was one of fact for the jury. It must be presumed that the jury did not adopt the defendant's contention, that the explosion was caused by the freezing of the pipes and safety device in the laundry due to the plaintiff's failure to keep the cellar reasonably heated; as the judge explicitly instructed them that the plaintiff could not recover in that event. The plan and execution of the work were left entirely to the defendant, and it was his duty to do it in a workmanlike manner, with reasonable judgment, skill and care, according to the approved usages of his trade. On the evidence it was for the jury to determine whether he negligently failed to perform that duty, and whether such failure was the proximate cause of the explosion. It could be found that in the natural course of events he ought to have foreseen that the freezing of the safety valve supplied by him and placed where it was, was likely to happen. See *Black v. New York, New Haven, & Hartford Railroad*, 193 Mass. 448; *Horan v. Watertown*, 217 Mass. 185, 186.

The defendant saved numerous exceptions to the admission of testimony and to the failure of the judge to give the twenty rulings requested by him; but he has not supported any of them by argument or authority. On examination we discover no error in either respect. The charge, to which no exception was taken, fully covered the legal rights of the defendant.

Exceptions overruled.

JOHN WELSH, administrator, vs. CONCORD, MAYNARD AND HUDSON STREET RAILWAY COMPANY.

Middlesex. January 13, 1916. — March 2, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Causing death, In use of highway.

If a woman, wishing to take a street railway car which she sees approaching on a track at the opposite side of the street, runs or walks rapidly diagonally across the street in an attempt to reach a white post in time to take the car, waving her arms in the direction of the car to signal to the motorman to stop and, when the

car is only about ten feet away from her, goes upon the track and is struck and killed by the car, which is moving at a high rate of speed, the administrator of her estate cannot maintain an action against the corporation operating the railway under St. 1906, c. 463, as amended by St. 1907, c. 392, for negligently causing her death, there being no evidence that she was in the active exercise of reasonable care for her safety.

CROSBY, J. This is an action brought to recover damages for the death of Mary Welsh, the plaintiff's intestate, who was run over and killed by an electric street railway car of the defendant on Main Street in Concord on the evening of November 27, 1913. Main Street runs in an easterly and westerly direction, the defendant's track being on the southerly side of the street. There was a sidewalk on the northerly side of the street in this locality, but none on the southerly side. The plaintiff's intestate, with three other persons, on the evening of the accident had been visiting at the house of one Coyne on the northerly side of the street. The deceased and her three companions left the house about ten o'clock to take a car coming from the west. They saw the car while on the piazza of the Coyne house and when it was about eight hundred and seventy-five feet away. They travelled diagonally across the street in the direction of a white post which was located about one hundred and seventy-six feet easterly from the Coyne house. The evidence shows that they intended to reach the post in time to get the car. One of these persons, Callahan, testified that he ran along the sidewalk ahead of the others to signal the car. The deceased and Mrs. Callahan went toward the post along the travelled part of the highway. The deceased, as she went along, was either running or walking rapidly, and there is evidence that she waved her arms in the direction of the car to signal it. There is evidence that when she was about twenty feet from the post and when the car was only about ten feet away from her she went upon the track and was struck by the car which at the time was running at a high rate of speed.

In order that the plaintiff may recover, there must be some evidence to show that his intestate was in the active exercise of reasonable care and attention for her safety. Mere negative conduct, amounting only to freedom from fault, is not sufficient to warrant a recovery under the statute. St. 1906, c. 463, as amended by St. 1907, c. 392. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467. The deceased was not a passenger, nor did she be-

come entitled to the rights of a passenger by signalling the car. *Duchemin v. Boston Elevated Railway*, 186 Mass. 353.

At the close of the evidence, the judge of the Superior Court * ruled that the plaintiff could not recover and ordered a verdict for the defendant. The case is before us on the plaintiff's exceptions. We are of opinion that there was no evidence from which it could be found that the plaintiff's intestate was in the exercise of due care and that the verdict for the defendant was ordered rightly.

A person travelling upon the highway must exercise care to avoid known dangers. The gong was not sounded upon the car, nor was any signal given of its approach, but this is immaterial so far as the conduct of the deceased is concerned. She knew that the car was approaching and was endeavoring to take it at the white post. The facts as they appear from the undisputed evidence make it plain that, in her hurry and confusion to obtain passage upon the car, the plaintiff's intestate ran upon the track directly in the path of the car without regard to the manifest danger which confronted her. The car had been in plain sight from the time she left the Coyne house up to the time she was struck. There was no reason why she should have left a place of safety upon the highway and started to run or walk across the track when the car was but a few feet away and approaching at a high rate of speed. There was, so far as the evidence discloses, nothing to distract her attention, and no evidence that her senses were defective. While the accident was most unfortunate, we cannot escape the conclusion that the deceased, in her hurry to reach the post and take the car, in utter disregard for her safety, precipitated herself upon the track in front of a rapidly moving car, a place of great and obvious peril.

If we assume in favor of the plaintiff that there was some evidence that the defendant was negligent in running the car at too high a rate of speed, still that cannot affect the conduct of the deceased. As it could not be found that the plaintiff exercised any care for her safety, we are of the opinion that a verdict for the defendant was ordered rightly. *Adams v. Boston Elevated Railway*, 219 Mass. 515. *Plympton v. Boston Elevated Railway*, 217 Mass. 137. *Morse v. Boston Elevated Railway*, 216 Mass. 579.

* *Bell, J.*

Lawrence v. Fitchburg & Leominster Street Railway, 201 Mass. 489. *Neale v. Springfield Street Railway*, 189 Mass. 351. *Mathes v. Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416.

Exceptions overruled.

J. J. Feely, (*E. F. Loughlin & H. A. Baker* with him,) for the plaintiff.

A. A. Ballantine, (*H. H. Gilman* with him,) for the defendant.

GUY R. GOVE'S (dependent's) CASE.

Suffolk. October 18, 1915. — March 3, 1916.

Present: RUGG, C. J., LORING, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act. Words, "Lost."

Under the workmen's compensation act contained in St. 1911, c. 751, as amended by St. 1912, c. 571, where death has resulted from an injury to an employee arising out of and in the course of his employment, the measure of compensation to which the dependent of the deceased is entitled is not the amount of the loss caused to the dependent by the death of the employee, but the sum to be paid is measured and determined by the wages of the deceased, and in case of a partial dependency is to be the same proportion of the average weekly wages as the amount contributed by the employee to such partial dependent bears to the annual earnings of the employee at the time of his injury, without regard to the benefits, if any, received by the employee from the dependent.

Therefore, where the deceased employee was twenty-three years of age and lived with his father and mother to whom he paid nothing for his board, which was worth \$5 a week, and contributed an average of \$15.38 weekly to the support of his mother, it was held, that the Industrial Accident Board were right in deciding that the mother of the deceased was dependent upon him for support to the extent of \$15.38 and that the value of the board furnished to the deceased should not be deducted from the amount contributed by him to his mother's support.

In the same case the mother of the deceased employee testified that he took some of the money from his wages for carfares and lunches and other different expenses and handed the balance of his earnings to her, and that, "if he wanted anything in the way of clothing, or anything of that sort," he always came to her and she gave him the money. An arbitration committee found that during the year previous to his injury he worked six months, and that during that six months his earnings were \$550, or an average weekly wage of \$21.15, that out of this \$550 he paid \$150 for clothing, tuition and incidentals, making an average of \$15.38 which he contributed to the support of his mother, she being dependent upon him for support to that extent. The Industrial Accident Board confirmed these findings. They also found under St. 1911, c. 751, Part V, § 2, that the average weekly wages earned by a person in the same grade employed in the same class

of employment in the same district were \$21.15 and that therefore the finding of the arbitration committee was correct. *Held*, that the compensation awarded was a proper one.

In the same case it appeared that the reason that the deceased did not work during the whole of the year preceding his injury was that for six months of the year he was studying at a university and worked only during the other six months. It also appeared that during the year preceding his injury the deceased had worked for previous employers "by the piece" or for "so much a job." *Held*, that it was not necessary to decide whether the time devoted by the deceased employee to his studies was "lost" within the meaning of that word as used in St. 1911, c. 751, Part V, § 2, in defining "Average weekly wages;" because the case came within the other provision of the same paragraph of the statute, that "where, by reason of . . . the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned . . . by a person in the same grade employed in the same class of employment and in the same district."

LORING, J. On June 26, 1914, the deceased with his father went to work for one Brooker "to put up the rough work of the stairs that is done before the house is plastered" in a building under construction for which Brooker was a subcontractor. The next day the deceased lost his balance while at work, fell and was instantly killed.

It appeared in evidence that during the year preceding his death the deceased, who was twenty-three years of age, had been studying at Boston University and for that purpose had worked but six months during that year. It further appeared that his earnings during the year before the accident were from \$500 to \$600. His mother testified that the deceased "took some of the money for carfares and lunches and other different expenses" and handed the balance of his earnings to her "and if he wanted anything in the way of clothing, or anything of that sort, he always came to me and I gave him the money. . . . I think the college tuition was \$90. . . . I do not think altogether his expenses were as much as \$150." The arbitration committee found that "during the year previous to his injury he worked six months, and during that six months his earnings were \$550, or an average weekly wage of \$21.15; that out of this \$550, \$150 was paid [by] him for clothing, tuition and incidentals, making an average of \$15.38, which he contributed weekly to the support of his mother, Catherine M. Gove, she being dependent upon him for support to the amount of \$15.38 a week. We, therefore, find that he received an injury arising out of and in the course of his employ-

ment, which resulted in his death on June 27, 1914, and that his mother is entitled to compensation at the rate of \$7.27 a week for a period of three hundred weeks from the date of the injury. We also find that he lived at the home of his father and mother and paid nothing for his board, and that his board was worth \$5 a week, and we make no deduction from the dependent mother on account of the board furnished by the father."

A review was claimed.

The Industrial Accident Board on review confirmed the findings of the arbitration committee. In addition they found that the deceased had "lost" twenty-six weeks during the preceding year within Part V, § 2, cl. 4,* of the workmen's compensation act. They further found that: "If the average weekly wages should be figured in accordance with the second portion of the section above quoted, that is by [with] regard to the average weekly amount which during the twelve months previous to the injury was being earned by a person in the same grade employed at the same work by the same employer, the average would remain unchanged. If figured, also, on the basis of the average weekly wages earned by a person in the same grade employed in the same class of employment and in the same district, the average is \$21.15. Therefore, the average weekly wage reported by the committee is correct." †

The board refused to make six rulings asked for by the insurer so far as they were inconsistent with their findings.‡

* St. 1911, c. 751, Part V, § 2, cl. 4, is as follows: "'Average weekly wages' shall mean the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer; or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district."

† On appeal to the Superior Court *Morton, J.* made a decree affirming the decision of the Industrial Accident Board; and the insurer appealed.

‡ The insurer's requests for rulings were as follows:

1. The evidence warranted the finding that the deceased was an employee of Brooker at the time he fell. His father testified: "I made the arrangements with Mr. Brooker for this job. . . . I was to work by the day at \$4.40, and it was the same wage for the boy." Brooker testified that the father of the deceased "agreed to so much a flight for this job, \$2 a flight. . . . I paid him at the rate of \$4.40 because he did not finish that job." In this conflict of testimony the committee and the board were warranted in believing the father and finding that the deceased was an employee of Brooker.

2. The board were right in not deducting \$5 a week, the value of the board which the dependent furnished to the deceased.

The ruling of the board on this point is concluded by the decision in *Murphy's Case*, 218 Mass. 278. The insurer has sought to distinguish the case at bar from the decision in that case (first) on the ground that in that case the deceased contributed all his earnings to the dependent and (secondly) on the ground that whatever the rule may be in ascertaining the amount of compensation to be paid to a dependent the value of the board received by the deceased is to be deducted in ascertaining the amount of the contribution made by the deceased to the dependents

"1. On all the evidence the board must find that the applicant, Catherine M. Gove, is not entitled to compensation.

"2. On all the evidence the board must find that Guy R. Gove, at the time he sustained the injuries which resulted in his death, was not an employee of Morris Brooker within the meaning of the workmen's compensation act.

"3. On all the evidence, the board must find that the sum of \$5 per week which was held by the committee of arbitration to be a fair charge for board paid to the applicant by the said Guy R. Gove during the year previous to his death, should be deducted from any award made to the applicant in this case.

"4. On all the evidence and upon the report of the committee of arbitration the deceased Guy R. Gove contributed the amount of \$5 per week for his living expenses to his mother, Catherine M. Gove, and such amount should be deducted from any award to the said Catherine M. Gove in this case.

"5. On all the evidence it does not appear as was found by the committee on arbitration that the board of the deceased was furnished by his father.

"6. In determining the average weekly wages of the deceased Guy R. Gove, the total amount earned in the year previous to his death and [sic] should be divided by fifty-two. It does not appear on all the evidence that any time was lost by the deceased within the meaning of the word 'lost' as used in the workmen's compensation act."

within the latter part of Part II, § 6 * of the workmen's compensation act. But the decision made in the *Murphy* case covers both points although the particular contentions now made were not made in that case and therefore were not in terms directly discussed by the court in making that decision. In *Murphy's Case* the deceased handed the dependent (his father) all his earnings amounting to \$5.67 a week. But it appeared in that case that the father maintained the deceased (his minor son), furnishing him his board, lodging and clothing which cost at least \$2.50 a week. If the value of the board, lodging and clothing furnished by the dependent to the deceased is to be deducted in ascertaining the amount of the contribution made by the deceased to the dependent, the deceased in *Murphy's Case* did not contribute all his wages. The amount of his contribution on that basis would have been \$5.67 (the amount of his wages) less \$2.50, the value of the board, lodging and clothing furnished to him by his father (the dependent). That is to say, the deceased in *Murphy's Case* on that basis contributed a part only of his wages to his father the dependent. It is apparent therefore that *Murphy's Case* is a decision denying the correctness of both of the contentions now made by the insurer.

In view of the fact that the contentions now made by the insurer were not directly made and therefore not discussed in *Murphy's Case*, and because of insistence of counsel in the case at bar upon authority of *Tamworth Colliery Co. Ltd. v. Hall*, [1911] A. C. 665, we add a further word to the explanation of the matter given in that case.

Where an employee receives and is killed by a personal injury arising out of and in the course of his employment and by reason

* The latter part of the St. 1911, c. 751, Part II, § 6, is as follows: "If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury."

thereof a claim is made under the workmen's compensation act, two questions arise, namely: (first) was the claimant in whole or in part dependent upon the deceased and (secondly) if he was, what is the amount to be paid the dependent under Part II, § 6, of the act?

So far as the first question is concerned there is no substantial difference between our workmen's compensation act (St. 1911, c. 751, Part II, § 6) and the English workmen's compensation act (St. 6. Edw. VII, c. 58, § 13, cl. 4). For that reason decisions under the English act upon the first question are authorities to be considered with respect to that question under our act. *Tamworth Colliery Co. Ltd. v. Hall*, *ubi supra*, was in terms a decision upon the first of these two questions although in effect it was also a decision upon the second. The deceased in that case (a minor) handed to his father all his wages amounting to 6s. 11d. a week. "This sum was admitted to be not more than sufficient to pay for his (the deceased's) maintenance." But it also appeared in that case that the deceased was "able to lather, shave, and cut hair" and that he helped his father out of hours in his occupation of a barber. The father "estimated the loss to the business consequent on the death of the deceased at 6s. a week." Under these circumstances it was held by the House of Lords that in determining whether the father was or was not in fact dependent upon the deceased all the circumstances had to be considered including the value of the maintenance received by the deceased from his father and the value of the services rendered out of hours by the deceased to his father. And the decision of the county judge, who felt bound as matter of law under the circumstances stated above to find that the father was not dependent upon the deceased, was set aside.

But on the second of the two questions stated above, namely, what sum is to be paid to the dependent as "a weekly compensation" under Part II, § 6, of our workmen's compensation act in case the first question of fact is decided in favor of the person who claims to have been dependent upon the deceased, the decision in *Tamworth Colliery Co. Ltd. v. Hall* and the principles on which it was decided are of no consequence.

. It is provided in the English act that in case the deceased workman left dependents in part dependent upon his earnings the amount payable is "such sum" as "may be determined . . . to be

reasonable and proportionate to the injury of the said dependents." St. 6 Edw. VII, c. 58, Schedule 1, (a) (ii). That is to say, the amount of compensation to be paid under the English workmen's compensation act is measured by the injury caused to the dependents by the death of the deceased. In other words, the measure of compensation under the English act is the same as that provided by Lord Campbell's act (St. 9 & 10 Vict. c. 93) as the measure of compensation to be made for tortiously causing the death of one upon whom the plaintiffs were dependent.

But the principle of Lord Campbell's act has never been adopted under any circumstances in Massachusetts. Fifty years before the enactment of Lord Campbell's act the Legislature of Massachusetts adopted the policy of imposing a penalty for wrongfully causing the death of another and the penalty so imposed was given as a gratuity to those who were dependent upon the deceased. That policy has been continued in Massachusetts down to the present time. See *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510; *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8; *Boott Mills v. Boston & Maine Railroad*, 218 Mass. 582. With this policy of Massachusetts as to the way in which the wrongful causing of the death of a human being was to be dealt with, it is not surprising to find that in enacting the workmen's compensation act the Legislature did not adopt the English measure of the compensation to be made to dependents in case the deceased employee was killed by an injury received in the course of and arising out of his employment. In place of following the English rule (the amount of injury caused to the dependents) the Legislature adopted the wages of the deceased as the basis by which the amount to be paid was to be measured. They provided that where the claimant was wholly dependent upon the deceased one half of his average weekly wages (within a maximum and minimum amount there stated) should be allowed for a period of three hundred weeks from the date of the injury. Where the claimant is wholly dependent upon the deceased it is of no consequence whether he contributed all his wages or only a fraction of them to the dependent, and it is of no consequence whether the deceased did or did not receive any benefit from the dependent. The sum to be paid is measured by the wages of the deceased not by the injury done to the dependent. Where the dependents were only

partly dependent upon the earnings of the deceased the amount to be paid is "a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury." The amount to be paid in case the dependent was partly dependent only is to be a portion of that paid in case of those wholly dependent and the amount is to be determined on the same basis — that is to say, it is to be measured not by the injury done the dependent but by that proportion of the average weekly wages of the deceased which the amount of the wages contributed by him to the dependents bore to the amount of his annual earnings without regard to the benefits, if any, received by the deceased from the dependents.

The insurer in the case at bar has made a further contention, namely, that the rule adopted by the board was inconsistent with itself. His argument in this connection is that, if no deduction is to be made from the amount of wages of the deceased by reason of board which was worth \$5 a week, no deduction ought to have been made by reason of the \$150 spent by the deceased "for clothing, tuition and incidentals." But the two stand on different footings. It appears that the deceased handed substantially all of his earnings to his mother; that when he wished to spend money for "clothing, tuition and incidentals" he procured the necessary money from her. So far as these matters are concerned it is plain that his mother acted as his banker. He did not make a contribution to his mother of all his earnings. It appears that "he took some of the money for carfares and lunches and other different expenses" before he handed anything to his mother. The sums deducted by him for these purposes before handing anything to his mother stood on the same footing as the money he got from his mother to spend in "clothing, tuition and incidentals." The only difference between the two is that in one case he obtained a benefit from the common fund to which he made a contribution and in the other that he spent some money on his own account out of his wages before he contributed the balance to the dependent his mother.

3. The next contention made by the insurer is that in determining the average weekly wages of the deceased the time during

which he elected not to work in order to pursue his studies at the university is not time "lost" within the provision of Part V, § 2, cl. 4. We do not find it necessary to consider this question because there was no evidence on which it could have been found (or at least impliedly found as it was impliedly found both by the arbitration committee and by the Industrial Accident Board) that the deceased worked as an employee during the year next preceding his accident. The father of the deceased testified that in the particular work on which the deceased was employed when he met his death both he and his son were working by the day. But nowhere did he testify that at any other time during the preceding year had he or his son worked by the day. The father testified that during the year he had worked for other contractors; that he had worked "nearly all summer for Mr. O'Connor" and "we have worked also for Mr. Gerlach, and Lamson and Seeley, during the past year." He also testified "I have worked for so much a job, but this job was not that way." Beyond that there was no testimony by the father of the deceased as to the basis on which he and his son worked for other persons during the year next preceding the injury here in question. O'Connor testified that the deceased and his father worked for him "last year and this year. They went to work for me just after Labor day, 1913. . . . I always employed them by the piece." O'Connor testified that the job which began on Labor day, 1913, lasted five or six weeks and "another job came in May, 1914," and the father and son had just completed that job when he began the work here in question.

Under these circumstances the case comes within the last clause of Part V, § 2, cl. 4, namely, "Where . . . it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount . . . earned . . . by a person in the same grade employed in the same class of employment and in the same district." It appeared that the deceased was a member of the union and that the union rate of wages was \$4.40 a day.

The entry must be

Decree affirmed.

A. H. Stetson, for the insurer.

W. A. Chandler, for the dependent mother.

MICHAEL F. BROGAN vs. MAYOR OF LAWRENCE & others.

Essex. November 3, 1915. — March 3, 1916.

Present: RUGG, C. J., LORING, BRALEY, & CROSBY, JJ.

Municipal Corporations, Officers, Mayor. Licensing Board. Mandamus.

Where a mayor of a city, being about to undergo an operation, signed a paper purporting to be an appointment of a certain officer, of which the person named as the appointee was not informed, saying "That is only temporary" and intending the appointment "to be of a testamentary and revocable character, to take effect upon [the mayor's] death," and afterwards the mayor, having survived the operation, caused the name of the person named as appointee to be erased on the paper and the name of another person to be inserted in its place, the first proposed conditional appointment never took effect and a vacancy existing when the paper first was signed can be filled by the appointment of the person whose name was inserted in place of the name erased.

A member of a licensing board appointed under R. L. c. 100, § 4, is not required to take an oath of office in order to qualify.

A member of the licensing board of the city of Lawrence was appointed by a writing signed by the mayor in which the name of the appointee was inserted by direction of the mayor after the writing had been signed by the mayor, and the appointee was notified of his appointment. Not long thereafter the mayor died and the day after his death the writing making the appointment in accordance with the mayor's previous direction was handed to the appointee, who about three weeks later attended a meeting of the licensing board, presented his letter of appointment and was admitted by the other members of the board to participate in the meeting. *Held*, that the appointee properly was appointed and qualified, and that the granting of a writ of mandamus to compel the new mayor and the members of the licensing board to recognize such appointee as a member of that board was a proper exercise of judicial discretion.

LORING, J. This is a petition for a writ of mandamus to compel the respondents to recognize the petitioner as a member of the licensing board of the city of Lawrence. The case was submitted to the single justice * on an auditor's report and is before us on exceptions of the respondents taken at the trial before him. The respondents in argument have not followed the particular exceptions taken by them. For that reason we address ourselves

* *Carroll, J.* He found that the petitioner was appointed a member of the licensing board of the city of Lawrence in July, 1914, for a term of six years and that he never had been removed from that office, and ordered that the writ should issue.

to the argument and not to the exceptions. The exceptions cover the contentions made in argument.

It appears from the auditor's report that the mayor of Lawrence, being about to undergo an operation, asked one Corcoran to draw up a letter appointing one Dr. Sullivan to fill a vacancy in the licensing board of the city. Corcoran, having tried unsuccessfully to find pen and ink, drew up the letter of appointment in pencil. The mayor signed the appointment and at that time said to Corcoran, "That is only temporary." And the auditor found that "this appointment was intended to be of a testamentary and revocable character, to take effect upon Mayor Scanlon's death." No notice of this appointment was given to Dr. Sullivan. Mayor Scanlon survived the operation. Later he determined not to appoint Dr. Sullivan and in a conversation with Corcoran "referring to the appointment of a member of the licensing board [he] asked Mr. Corcoran to change that to Michael F. Brogan, the petitioner." Thereupon Corcoran rubbed out the name of Sullivan and inserted in the appointment (written in pencil) the name of Brogan, the petitioner. The mayor told Corcoran that he might notify Brogan (but no one else) of the appointment, as he did not wish to have the appointment made public until he (the mayor) had notified one Woodbury, a member of the licensing board. Thereupon Corcoran notified Brogan that he had been appointed. Later the mayor told Corcoran that he had seen Woodbury and that he would make the appointment public on August 17, 1914. The mayor died on August 16, 1914. On August 17 Corcoran delivered the written appointment to the petitioner. On August 18 the petitioner took an oath of office before the commissioners to qualify civil officers and on September 8 attended a meeting of the licensing board. He then presented his letter of appointment and was admitted by the other members of the board. The records of the meeting of the board on that day state: "Change in the board, Michael F. Brogan having been appointed to succeed James H. Clifford, Jr., July 21, 1914, and qualifying August 18, 1914, took his seat at this meeting, having brought the proper credentials with him, and the credentials were read by the other members of the commission." Later the successor to Scanlon in the office of mayor undertook to appoint the respondent McCarthy to the office claimed by the petitioner and since then the

petitioner has been excluded "from the exercise of the functions of the office."

The single justice found that a peremptory writ of mandamus ought to issue.

1. The first contention of the respondents is that the appointment of Dr. Sullivan was complete and therefore that there was no vacancy when the mayor directed Corcoran to rub out Sullivan's name from the letter of appointment and insert that of the petitioner.

Of course the mayor could not make a testamentary or revocable appointment. The finding of the auditor, that the mayor's intention was that the letter of appointment which Corcoran made under his direction should be testamentary and revocable, and the mayor's statement to Corcoran that that letter was only "temporary" mean that the mayor never intended to have that letter, signed by him, take effect as a completed instrument. Under the findings of the auditor adopted by the single justice the letter in which it was stated that he appointed Dr. Sullivan was never intended by him to be and never was adopted by him as an appointment and therefore did not affect the vacancy which then existed.

2. By R. L. c. 100, § 4, it is provided that "All members [of licensing boards appointed under that statute] shall hold office until their respective successors are appointed and qualified." We have been referred to no statute which requires members of licensing boards to take an oath of office. We are satisfied that there is no such statute. Under these circumstances it is not necessary for a member of the licensing board to take an oath of office in order to qualify. Where an officer is required to take an oath before entering upon the duties of his office, qualifying includes taking the oath. But, where no oath is required, the fact that he must qualify does not make it necessary for him to take an oath of office. We are of opinion that the petitioner qualified when he attended the meeting of the licensing board on September 8, presented his letter of appointment and was admitted by the other members of the board to participate in the meeting. Whether all these acts were necessary in order to make qualification by the petitioner complete it is not necessary to decide.

3. The eighth ruling asked for by the respondents, namely, that the granting of a writ of mandamus is discretionary and

the court can exercise its discretion upon the facts stated in the report, was correct. It is hardly necessary to add that the single justice was not bound as matter of law to exercise his discretion by denying the writ.

The entry must be

Exceptions overruled.

J. P. Sweeney, for the respondents.

H. Parker, for the petitioner.

ALFRED W. PUTNAM, trustee in bankruptcy, vs. UNITED STATES TRUST COMPANY.

Suffolk. November 11, 1915. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Bankruptcy, Unlawful preference. *Equity Pleading and Practice*, Findings of trial judge.

Where an insolvent person, who later became a bankrupt, had a deposit and account at a bank, to which he owed money upon notes not then due, and drew out the money by a check payable to the bank and delivered it to the bank to be applied toward reducing his indebtedness, and where the attempted set-off took place within the four months preceding the filing of the petition in bankruptcy, it cannot be ruled as matter of law that there has been a preference, but it must be determined as a fact.

On an appeal in equity, a finding and ruling of the trial judge can be sustained on a ground not adopted by him, and the fact that he stated a wrong reason is immaterial.

In a suit in equity by a trustee in bankruptcy against a bank to recover money alleged to have been paid by the bankrupt to the defendant as a fraudulent preference, it appeared that the bankrupt had procured from the defendant a loan of \$10,000 on three notes bearing indorsements of a person of good credit, payable in four, five and six months respectively, that five days later the defendant's president, finding that the genuineness of the indorsements was questioned, informed the bankrupt that he did not want any paper as to the indorsement of which any question was made and demanded that the matter be closed at once by the bankrupt taking up the notes, that the bankrupt acceded to this demand and thereupon drew a check on his account with the defendant for \$5,500, which was practically all that he had left there of the \$10,000 he had borrowed, and promised to pay the balance due on the notes on that day or the next, that the bankrupt then was insolvent and that about a month later he was petitioned into bankruptcy. The judge who heard the case found and ruled that the defendant was entitled to retain the \$5,500 thus paid to it by the bankrupt.

Held, that the finding and ruling could be sustained on the ground that the transaction between the defendant and the bankrupt, consisting of the loan and the discount of the notes, was rescinded by the parties.

In the suit above described, it also appeared that, five days after the rescission, the bankrupt brought to the defendant \$500, which he deposited with the defendant, that he immediately drew out the same amount by a check payable to the order of the defendant, which was credited to him on one of the notes, and that he made two other similar payments of \$500 each in like manner respectively one week and two weeks later. The trial judge found that the defendant had reasonable cause to believe that a preference would be effected in its favor and to its advantage over other creditors of the bankrupt by the payments of the \$1,500, and ruled that the plaintiff was entitled to recover this amount. *Held*, that, on the foregoing and other facts disclosed by the evidence, the finding and the ruling of the judge, who had had the advantage of seeing the bankrupt and the officers of the defendant on the witness stand, could not be said to be wrong.

RUGG, C. J. This is a suit in equity by the trustee in bankruptcy of one Mendelsohn, to recover money alleged to have been paid by the bankrupt to the defendant in fraud of the bankruptcy act. The facts briefly stated are that Mendelsohn, a stranger to the officers of the defendant, was introduced to them on December 22, 1911, as one all right to do business with, by his attorney, who was well and favorably known to them. He applied for a loan of \$10,000, offering his own notes indorsed by one Tappan. The officers of the defendant, through inquiry of other banks, were assured of the ample resources and credit of Tappan and discounted three notes, for \$3,000, \$3,500 and \$3,500, on four, five and six months' time respectively, made and indorsed by Mendelsohn and apparently indorsed also by Tappan, and the proceeds were credited to Mendelsohn on the books of the defendant. In consequence of notice sent to Tappan according to its custom by the defendant, it was told on December 27, 1911, by the son of Tappan, that his father had indorsed no such notes. Thereupon, the defendant at once sent for Mendelsohn, told him the information received as to the indorsements upon his notes, and asked him to take up the notes at once. Mendelsohn declared the indorsements genuine, and that Tappan was an old friend with whom he had done business and who did not want his family to know about his indorsement of the notes. Mendelsohn offered to go to Attleborough with any representative of the defendant to see Tappan. But he acceded to the demand that the matter be closed up, be-

cause the president of the defendant stated that he did not want paper as to the indorsement of which any question was made, and thereupon gave his check to the defendant for \$5,500, the balance left on his account with the defendant being then \$21.26, which he said he wanted to have remain to cover some outstanding checks, and promised to pay the balance of the notes on that day or the next. He did not present himself again until January 2, 1912, when he deposited \$500 with the defendant and immediately drew a check for that amount to its order which was credited upon one of his notes. This was repeated on January 9 and 16. Mendelsohn was insolvent on December 22. When the three payments of \$500 each were made the defendant knew he was insolvent. He was petitioned into bankruptcy on January 27, 1912, and was adjudicated a bankrupt on May 23, 1912.

The single justice * who found these facts also found and ruled that the defendant was entitled to hold the \$5,500, that amount being on deposit with the defendant to Mendelsohn's credit and he then owing the defendant a larger sum, and that under these circumstances it was not a preference condemned by the bankruptcy act. This imports a finding of all essential and subsidiary facts necessary to sustain the conclusion reached. Such finding will not be set aside unless it appears to be wrong.

There are two grounds, upon either of which this finding and ruling can stand. The first is that it was the exercise by the parties of the right of set-off. The notes of Mendelsohn, the bankrupt, held by the defendant, although not then due, were provable against his estate in bankruptcy. U. S. St. of 1898, c. 541, § 63 a (1). Therefore, they were subject to set-off under § 68 of the act, and the defendant could have set them off against his deposits. There could be no contention that this could not be done if bankruptcy proceedings had been instituted on December 27, 1911, at the time the transaction as to the \$5,500 occurred. *Germania Savings Bank & Trust Co. v. Loeb*, 110 C. C. A. 263. *New York County National Bank v. Massey*, 192 U. S. 138. Generally, instances of the exercise of the right of set-off have occurred either at the adjudication of bankruptcy or, if before then, when the note of the bank was due or overdue. Statements to the effect that the right of set-off may

* *Carroll, J.*

be exercised only when the note has matured are to be found in some of the cases. *Shale v. Farmers Bank*, 82 Kans. 649. *Irish v. Citizens' Trust Co.* 163 Fed. Rep. 880. It is true that in this Commonwealth there is no right of set-off of an unmatured note even in cases when the other party is insolvent. *Jump v. Leon*, 192 Mass. 511, where the cases are collected. But this rule, which sometimes appears harsh in operation, does not prevail in equity in the federal courts. *Schuler v. Israel*, 120 U. S. 506. *Carr v. Hamilton*, 129 U. S. 252. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596. It is settled that the time when the right of set-off may be exercised is not restricted to the adjudication, but may be valid, if otherwise unassailable, at any time within the four months before bankruptcy. *Studley v. Boylston National Bank*, 229 U. S. 523. In the opinion in that case it was said at page 529: "It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14 to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for \$5,000 were paid or notes for \$5,000 were charged, was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of set-off. The bankruptcy act recognizes this right and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference. But to deny the right of set-off, in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy and so interfere with the course of business as to produce evils of serious and far-reaching consequence." This statement, although used as to rights of set-off exercised at the maturity of notes, seems to be phrased advisedly with sufficient broadness to be equally applicable to the equitable exercise of the right at a time when there is in fact bankruptcy, although not manifested by proceedings in the court. The principle declared is not restricted in its operation to matured notes and in reason seems to be as applicable to cases like the one at bar as to the one there under consideration. It cannot be assumed that the comprehensive

statement of the principle was inadvertent or unconsidered. That principle is that the parties lawfully may do beforehand the exact thing which the law requires to be done when bankruptcy is established. Of course, if done before the bankruptcy, then the question of preference becomes involved and must be determined. But that is a fact ordinarily to be found in the light of all the circumstances. If it is not found that the bank had reasonable cause to believe that the payment of the notes would act as a preference, then the transaction will stand. If between the parties the right of set-off is exercised as to an unmatured note within the four months preceding the petition in bankruptcy, it cannot be ruled as matter of law that there has been a preference, but it must be determined as a fact. This was what was done in *Ridge Avenue Bank v. Studheim*, 76 C. C. A. 362, where a similar question was left to the jury. It seems to follow as a necessary result from *Studley v. Boylston National Bank*, 229 U. S. 523.

The form in which such set-off is accomplished as between banker and depositor is immaterial. It may be by the giving of a check or by direct method of bookkeeping. That appears to be settled by *Lowell v. International Trust Co.* 86 C. C. A. 137, 140, and *Studley v. Boylston National Bank*, 118 C. C. A. 435; *S. C.* 229 U. S. 523, notwithstanding *In re National Lumber Co.* 129 C. C. A. 448.

The findings of fact in the case at bar are against the plaintiff, upon whom rests the burden of the proof. It is not necessary to review the evidence. A careful study of it convinces us that the finding that the plaintiff failed to prove that the defendant received the \$5,500, having reasonable cause to believe that it would result in a preference, was not wrong.

This finding and ruling of the single justice may also be supported on the ground that the loan and discount of the notes were rescinded. It is immaterial that this was not the reason given by him, if the result thereby may be upheld. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 384. The transaction between the defendant and Mendelsohn on December 27, 1911, appears to have amounted to a rescission of the arrangement for the discount of the notes made five days before, an avoidance of that transaction and a repossession by the defendant of the money credited on its books to Mendelsohn. Such an annulment is a

common law right, and does not depend upon the bankruptcy law. It was not necessary for the defendant to return or tender to Mendelsohn the notes. *Thurston v. Blanchard*, 22 Pick. 18. *Donaldson v. Farwell*, 93 U. S. 631. *Turner v. Ward*, 154 U. S. 618.

The finding of the single justice as to the three subsequent payments by Mendelsohn to the defendant was in these words: "At the time the first \$500 was paid, and at the time of the two subsequent payments of \$500 each, the trust company knew that Mendelsohn was insolvent. Considering the unusual nature of the transaction, where a depositor opened an account, and a large part of the account consisted of the proceeds of three notes, where indorsements thereon were alleged to be forged; considering the defendant's opportunities for information, and its knowledge of the standing of its customers; that Mendelsohn's place of business was only a short distance away from the place of business of the defendant; the fact that, instead of paying the money directly to the defendant, he deposited the money, and, as part of the same transaction, made out and delivered to the trust company, a check for the identical amount then deposited; that none of the notes were due; that the officers of the trust company were men of more than ordinary prudence and foresight in commercial matters; and from all the facts and circumstances, I find that the defendant had reasonable cause to believe that a preference would be effected in its favor, and to its advantage over the other creditors of Mendelsohn by the payment of this \$1,500."

The controlling provision of the bankruptcy law is § 60, the material part of which (as amended February 5, 1903, and June 25, 1910) is: "a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. b If a bankrupt shall have . . . made a transfer of any of his property, and if, at the time of the transfer . . . being within four months before the filing of the petition in bankruptcy . . . the bankrupt be insolvent and the . . . transfer then operate as a preference, and the

person receiving it . . . shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

This section requires, as the condition for recovery by the trustee in bankruptcy against the creditor, three distinct facts: the bankruptcy, that the transaction then effected a preference and that the creditor then had reasonable cause to believe that a preference was being effected. The only serious contention which can be made in this connection is respecting the last factor, whether the defendant at the time of receiving these three payments of \$500 each had "reasonable cause to believe" that these payments would effect a preference.

The governing principles of law upon this point are in substance that reasonable cause to believe is not the equivalent of reasonable cause to suspect. The two "phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, — and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law." *Grant v. National Bank*, 97 U. S. 80, 81. *Stucky v. Masonic Savings Bank*, 108 U. S. 74. *In re Chicago Car Equipment Co.* 128 C. C. A. 142. *Rosenman v. Coppard*, 142 C. C. A. 520, (228 Fed. Rep. 114). Applying this statement of the law to the evidence, we think the finding of the essential facts to support recovery by the plaintiff of those three payments is well warranted. The officers of the defendant were men of experience in business. Mendelsohn, when confronted with the information that the son of the man whose name appeared as in-

dorser upon his notes denied the genuineness of the indorsements, promised to bring in the entire amount due to the defendant that day or the next, but did not come in for a week, and then brought only \$500. He made no effort beyond his own statement to convince the officers of the defendant that the indorsements were genuine, although the alleged indorser lived in a town not far away. He does not appear to have manifested any concern at the situation. No officer of the defendant visited his place of business, although it was only a few steps away. Although the original discount of the notes appears to have been made chiefly on the financial responsibility of the indorser, no attempts were made, after the cloud was cast upon his liability on the notes by the telephonic message from the son, by the officers of the defendant to ascertain about Mendelsohn, even after his delay in keeping his new promise to make complete payment on that day or the next. It well might have been found that men of ordinary prudence under these circumstances could not fail to have reasonable cause to believe that the payments received by the defendant were preferences. Moreover, the single justice had the advantage of seeing Mendelsohn and the officers of the defendant upon the witness stand and from their appearance in connection with their testimony might re-create in part at least the true situation as it existed on the several dates when these three payments were made.

Since both parties appealed from the final decree, and as no error is shown, no costs are allowed.

Decree affirmed.

Lee M. Friedman, for the plaintiff.

A. E. Pillsbury, (*G. M. Palmer* with him,) for the defendant.

DUDLEY N. HARTT & another vs. HENRY A. RUETER & others,
trustees.

ROBERT H. GARDINER & another, trustees, vs. SAME.

Suffolk. October 18, 19, 1915. — March 1, 1916.

Present: RUGG, C. J. LORING, CROSBY, PIERCE, & CARROLL, JJ.

Equitable Restrictions. Deed. Land Court. Words, "Porte-cochère."

Where equitable restrictions were imposed upon thirteen lots of land adjoining a certain private street according to a general plan for the development of the entire tract of land, the fact, that the restrictions imposed upon three of the lots situated at the end of the private street, which had no outlet at that end, differed from the uniform restrictions imposed on the other ten lots in not requiring like those restrictions that dwelling houses should be set back twenty-five feet from the private street but permitting houses to be built up to the line of the way on those three lots, does not affect the character of the restrictions on the other ten lots or render such restrictions less binding.

A right to the enforcement of an equitable restriction for the benefit of a lot of land is appurtenant to the land and passes under a deed that conveys the land "together with . . . all the rights, privileges and appurtenances thereto belonging," without any specific mention of the restriction.

Where an equitable restriction imposed upon lots adjoining a private street, called an avenue, required "that no building shall be placed nearer to said principal avenue than twenty-five feet," and a judge of the Land Court had found as a fact "that the porte-cochère of the house on the respondent's premises extends over, or into, the restricted area, it being at its northeast corner only seventeen and sixteen one hundredths feet from the westerly line of the principal avenue," and where there was nothing in the record except the word "porte-cochère" to indicate the nature of the structure and nothing to show when it was built, it was held, that, in the absence of a finding that the structure was built and maintained in violation of the restriction, it could not be ruled as matter of law that its existence constituted such a violation.

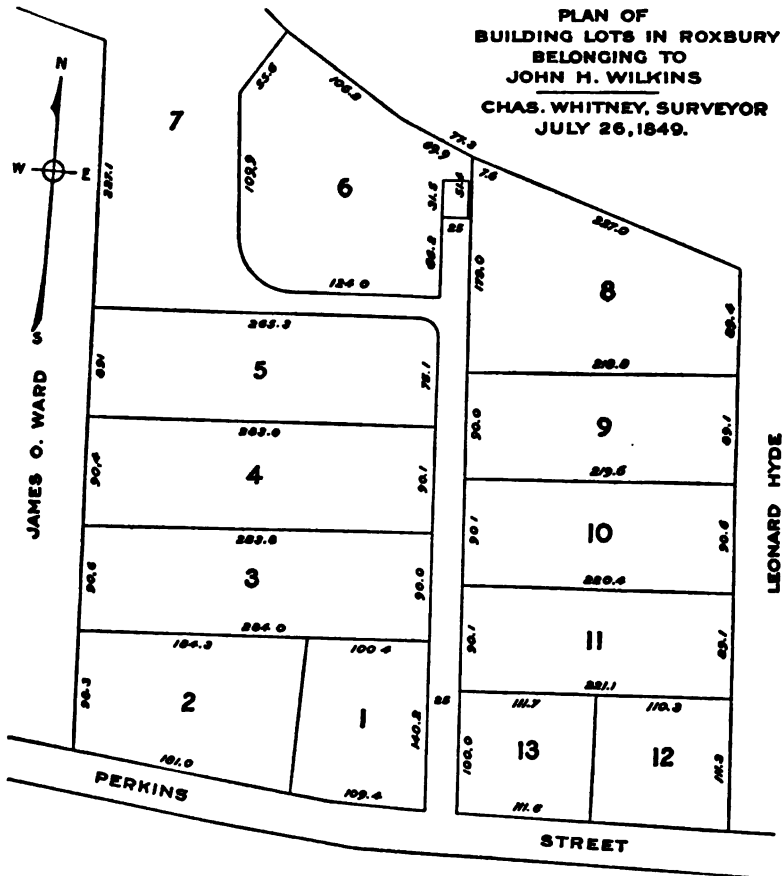
Although in a case in the Land Court, where a trial by jury is not claimed, the findings of a judge of that court upon all questions of fact are final, yet, where the facts on which a finding was made are not in dispute and all the evidence is before this court, the question of law is presented whether the evidence justified the finding of the judge.

It cannot be found that the right to enforce an equitable restriction has been abandoned or relinquished, where no adverse use is established, and where there is no evidence of any act of the owner of the land to which the right to enforce the restriction is appurtenant unequivocally manifesting either a present intention to relinquish the restriction or a purpose inconsistent with its further existence.

CROSBY, J. These are two petitions brought in the Land Court to register and confirm the titles to certain parcels of land owned by

the petitioners respectively, and the question presented is whether such lands are subject to certain restrictions, recited in deeds of record given by their predecessors in title, which restrictions created rights that will be maintained in equity in favor of the respondents.

In 1849 John H. Wilkins owned a tract of land in Roxbury,



comprising the land of the petitioners and of the respondents, except a portion of the Gardiner property which is not affected by any question involved, and caused a plan to be made and recorded, dividing the tract into thirteen lots. This plan is entitled: "Plan of Building Lots in Roxbury Belonging to John H. Wilkins, Chas. Whitney, Surveyor, July 26, 1849." A reduced copy of this plan is printed above. By deed dated August 11, 1849, Wilkins con-

veyed to Elisha D. Winslow, under whom the respondents by mesne conveyances hold title, lots 1, 2 and 3 shown on the plan. This deed contains the following restrictions: "It is hereby understood and agreed that no buildings other than dwelling houses and the usual structures appurtenant thereto shall be erected on the premises; that no business shall be established thereon of a nature to be unhealthy or offensive in the neighborhood; that no building shall be placed nearer to said principal avenue than twenty-five feet, and the said Winslow and his assigns shall keep in repair one-half of said principal avenue so far as it joins the above granted premises, these same restrictions applying to all the lots on the Easterly side of said Avenue and now owned by Wilkins except lot No. 8."

When this deed was given, Wilkins was the owner of the remaining ten lots. By deed dated September 25, 1849, Wilkins conveyed to Joseph Nickerson lots 8 to 13, both inclusive, the title to which lots by mesne conveyances has become vested in the petitioners; and by deed dated September 27, 1849, Wilkins conveyed to Nickerson lots 4 and 5. Both of these deeds contain the same restrictions as those in the deed to Winslow, except that the set back on lot 8 applied only to a stable or outhouse.

By deed dated March 24, 1853, Nickerson conveyed lot 4 to Winslow subject to the same restrictions. The lots 1 to 4, both inclusive, are now owned by the respondents, except a strip on the westerly side since taken by the city of Boston for a public way. The Whitney plan shows a way running northerly from Perkins Street across the tract to a point between lots 6 and 8, with no outlet at its northerly end. This way is referred to in the original deed from Wilkins to Winslow as an "avenue," lots 1 to 7, both inclusive, being on the westerly side, and lots 8 to 13, both inclusive, being on the easterly side of the avenue. The lots on the easterly side of the avenue comprise a portion of the lands of both petitioners.

By deeds dated August 11, 1849, Wilkins conveyed lot 6 to Phineas B. Smith, and lot 7 to Ira Allen, subject to the same restrictions except that there was no set back on lot 7, and the deed of lot 6 prohibited the erection of a building thereon which should project over the westerly line of the avenue; these lots (6 and 7) were acquired by Nickerson by deeds dated August 12, 1850, and

March 23, 1859, so that upon the latter date Nickerson owned all the lots shown on the plan except lots 1 to 4 inclusive, owned by Winslow.

By deed dated August 29, 1859, Wilkins released to Nickerson all his right, title and interest in lots 5 to 13, both inclusive, using the following language: "Meaning and intending hereby to release and discharge any conditions, restrictions or limitations annexed to said premises by my said deeds." On the same date Wilkins executed a release in the same form to Winslow of the restrictions on lots 1 to 4, both inclusive. On August 30, 1859, Nickerson released to Winslow the restrictions on lot 4, and on May 28, 1860, Smith released to Nickerson the restrictions on lot 6.

By deed dated September 1, 1859, Winslow conveyed lots 1 to 4, both inclusive, to Benjamin F. Thomas. This deed did not specifically mention any restrictions upon the lands now owned by the petitioners, but referred to the Whitney plan and conveyed the lots "together with . . . all the rights, privileges and appurtenances thereto belonging." This deed also referred to the release from Wilkins to Nickerson and to the release from Nickerson to Winslow above referred to.

By deed dated September 12, 1871, Thomas conveyed lots 1, 2, 3 and 4 to Henry Herman Rueter, under whose will the respondents claim title. This deed did not specifically refer to any restrictive rights in the lands owned by the petitioners, but described the land conveyed as lots 1, 2, 3 and 4 "on said plan drawn by said Whitney," together with "all the rights, privileges and appurtenances thereto belonging."

The judge of the Land Court * found that "although the restrictions imposed by Wilkins were intended as a part of a general scheme or plan of improvement and development and were in the nature of equitable restrictions running with the land, they have been wholly lost by abandonment and are no longer operative."

The petitioners contend that the restrictions were personal in character and were not equitable restrictions imposed for the benefit of the land now owned by the respondents. They also claim that if such restrictions were not of a personal character they have been abandoned and are therefore no longer in force.

* Corbett, J.

1. We are of opinion that the judge of the Land Court was right in ruling in effect that upon all the evidence a general plan was established which created an equitable restriction for the benefit of the land of the respondents. This would seem to be obvious from the acts of the parties and the attendant circumstances. The plan for the development of the entire tract by Wilkins for use and occupancy as a residential district was not unlike that which has been adopted by other landowners, which this court has been called upon to consider and where such restrictions have been held to have been imposed as a part of a general plan for the benefit of an entire tract. *Whitney v. Union Railway*, 11 Gray, 359. *Hopkins v. Smith*, 162 Mass. 444. *Evans v. Foss*, 194 Mass. 513.

The fact that the restrictions upon three of the lots were not identical, and were different from those imposed upon the other ten, does not seem to be of much importance under the circumstances. Lot 7 was conveyed without any restriction as to the distance from the avenue that a building could be placed, but a reference to the Whitney plan shows that this lot did not abut upon the avenue, except a narrow strip thereof which was apparently the only means of access to the lot. The restriction upon lot 6 was that no building should be erected projecting over the westerly line of the avenue, and the set back on lot 8 applied only to a stable or outhouse. So far as the location of lots 6 and 8 is concerned we do not consider a variation of the restrictions in one particular affecting these two lots as of great significance. As these lots were situated opposite each other at the extreme northerly end of the avenue which had no outlet to the north, it would seem that to allow them to be built upon up to the line of the way would not materially affect the general plan. *Hano v. Bigelow*, 155 Mass. 341. *Bacon v. Sandberg*, 179 Mass. 396. *Evans v. Foss*, 194 Mass. 513. The case at bar is plainly distinguishable from *Webber v. Landrigan*, 215 Mass. 221.

The fact that the later deeds under which the respondents claim title do not specifically refer to the restrictions does not indicate that they are merely personal covenants. The contention of the petitioners to the contrary cannot be supported.

In all the deeds under which the respondents claim title the restrictions are specifically set out, or else the lots were conveyed by deeds together with all the appurtenances thereto belonging.

Under the deeds last above referred to, the respondents not only took title to the lots therein described, but also, as appurtenant thereto, acquired an equitable restriction in the lands of the petitioners. As these rights were appurtenant to the land conveyed, no specific reference in the deeds to the restrictions was required to vest the right to enforce such restrictions in the respondents. *Crabtree v. Miller*, 194 Mass. 123, 126. *Willeys v. Langhaar*, 212 Mass. 573, 575. *Parsons v. New York, New Haven, & Hartford Railroad*, 216 Mass. 269.

The judge of the Land Court found as a fact that "It appears by a plan put in evidence by the petitioners that the porte-cochère of the house on the respondents' premises extends over, or into, the restricted area, it being at its northeast corner only seventeen and sixteen one hundredths feet from the westerly line of the principal avenue." "Porte-cochère" is defined as a large gateway allowing vehicles to drive into a courtyard. Sometimes in the United States it is applied erroneously to a covered carriage-way.

There is nothing in the record to indicate the nature of the structure, and in the absence of any finding that it was built and maintained in violation of the restrictions, we cannot so rule as matter of law. Whether its maintenance is contrary to the restrictions would depend on other facts not before us, including its dimensions, design, and the character of its construction, and also whether it was built recently or otherwise.

2. The judge of the Land Court found that the restrictions had been extinguished by abandonment. As a trial by jury was not claimed, the findings of the Land Court upon all questions of fact are final. R. L. c. 128, § 13. St. 1910, c. 560, § 1.

Where, however, no facts are in dispute, and all the evidence is before the court, a question of law is presented. If upon such facts and the reasonable inferences to be drawn therefrom, the evidence is insufficient as matter of law to justify the finding, it will be set aside. The evidence is all before us as the bill of exceptions recites, "The above facts, findings of facts and conclusions of facts were all the facts and all the evidence in these cases on which the court made its findings of fact and conclusions of fact and made its rulings of law."

In *Parsons v. New York, New Haven, & Hartford Railroad*, 216

Mass. 269, it is said, at page 272, "An easement created by deed is not defeated by mere non-user. There must be in addition other acts of the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." *Willets v. Langhaar*, 212 Mass. 573, 575. *Gorton-Pew Fisheries Co. v. Tolman*, 210 Mass. 402, 413. *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145. *Barnes v. Lloyd*, 112 Mass. 224. *Owen v. Field*, 102 Mass. 90, 114.

In the case at bar there is no evidence to show an adverse use of the dominant estate by the owner of the servient estate, nor is there evidence of any acts of the owner of the dominant estate conclusively and unequivocally manifesting either a present intention to relinquish the restrictions or a purpose inconsistent with their further existence. In other words, there is no evidence in the record to warrant a finding that the restrictions have been abandoned or relinquished. It follows that they are in force as appurtenant to the land of the respondents and the petitioners' lands are subject thereto respectively as above set forth, so far as their lands were a part of the original Wilkins' tract, as shown on the Whitney plan.

The result is the entry must be

Exceptions sustained.

D. C. Delano, for the respondents.

C. L. Barlow, for the petitioners.

CHARLES EKLON vs. CITY OF CHELSEA.

Suffolk. November 16, 1915. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Way, Public. *Evidence*, Presumptions and burden of proof.

Where a public highway once has been established it remains a public highway until it is discontinued as such by a duly authorized public board or officer or until the place of its location is given over lawfully to some other purpose.

A public use of land, when established, is presumed to continue unless its lawful extinguishment is shown affirmatively.

The facts that the park commissioners of a city, acting under proper authority, "set out with shrubbery and laid out in grass" an area adjoining a highway and constructed round it a brick walk with a curbing, a part of which was within the limits of the highway, do not deprive of its character the part of the highway occupied by the brick walk and its curbing, and the city is liable to a traveller who sustains an injury from a defect in the curbing of this part of the brick walk of which the city had notice.

TORT under R. L. c. 51, § 18, for personal injuries sustained by the plaintiff on July 3, 1912, by reason of a defect in the curbing of a sidewalk in Broadway, a public highway of the defendant. Writ dated February 4, 1913.

In the Superior Court the case was tried before *White, J.* The evidence upon the only point now material is described in the opinion. The judge, as stated in his report, "submitted to the jury three questions and stated to them that this was not a case in which they were to render a verdict for the plaintiff or for the defendant, but they were to treat the case, so far as their treatment was concerned, as though the sidewalk outside the closed iron fence was a part of the sidewalks of the city and not a part of a park."

In answer to the questions submitted to them the jury found that the plaintiff was in the exercise of due care and that the accident happened solely on account of the negligence of the defendant, and assessed the damages in the sum of \$3,500. The judge then ordered a verdict for the defendant, and reported the case for determination by this court. If the plaintiff was entitled to recover, judgment was to be entered for him in the sum of \$3,500 and costs; otherwise, judgment was to be entered for the defendant.

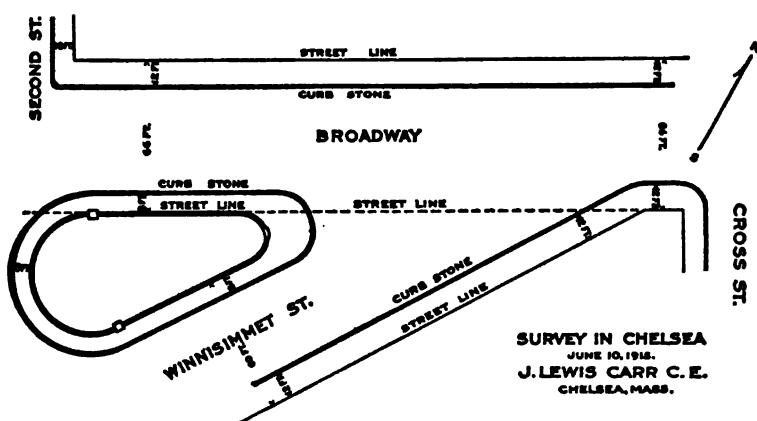
A reduced copy of the essential features of a plan which was used at the trial is printed on page 215.

R. W. Frost, for the plaintiff.

S. R. Cutler, for the defendant.

RUGG, C. J. This is an action to recover damages for injuries sustained by a traveller at a place alleged to be a public way in the defendant city. The only question is, whether as matter of law the place where the plaintiff was hurt was within a public way. The pertinent facts are that in 1871 that place was within the limits of a highway called Broadway, which then was widened so as to include it. The city of Chelsea seasonably accepted St. 1892, c. 325, whereby it was authorized "to use so much of Broad-

way square in said city as may be necessary for the purposes of a parkway or park." In July, 1896, after the enactment of St. 1895, c. 325, which authorized the city to incur indebtedness not exceeding \$100,000, beyond the limits fixed by law, for "acquiring and improving open spaces for park, parkway and playground purposes," the board of aldermen (being the proper board to pass such an order) voted to appropriate \$10,000, to be expended under the direction of the park commissioners for the improvement of Winnisimmet Square. The park commissioners, under that vote,



constructed the whole area included within a curb, the middle portion being "set out with shrubbery and laid out in grass." Outside of this was a brick walk and a curb, where the plaintiff was injured, which was within the limits of Broadway as widened in 1871.

It does not appear that any taking of land by written instrument or plan was made by the park commissioners. Doubtless, under some circumstances, a physical seizure of private property may constitute a taking under the power of eminent domain, *Bryant v. Pittsfield*, 199 Mass. 530, yet a mere change from one public board or officer to another in the care and maintenance of a part of a highway, without more, is not enough to constitute an extinguishment of the highway. There is nothing in the record to show that Broadway Square or Winnisimmet Square had a definite location. It does not appear where either of these squares is, or whether they are different squares or the same square with different names.

St. 1892, c. 325, authorizes only the use of Broadway Square, but not of Broadway, for a park or parkway.

This record fails to show that the place where the plaintiff was injured had ceased to be a highway. It was once appropriated to that public use. It continued to be a place of public travel. The presumption is that a lawful public use, once established, continues until it explicitly appears that the place has been given over lawfully to some other purpose. Land taken for one public use may be devoted to another public use only by legislative authority clearly expressed, whose mandate as to the method of actually making the change must be exactly followed. But whether there has been such change cannot be left to an indefinite surmise. If made, its nature and extent must be established by unequivocal acts. *Higginson v. Treasurer & School House Commissioners of Boston*, 212 Mass. 583, 591. When a highway is laid out, it cannot be discontinued or put to another use except by some public and notorious act of a duly authorized public board or officer. There is nothing to show that the proper officers of Chelsea have discontinued as a public way the part of Broadway where the accident occurred. It is not possible upon this record to go further than to say that as matter of law the place in question remained within the limits of Broadway, which as a highway the defendant was bound to maintain in a condition reasonably safe and convenient for public travel.

In accordance with the terms of the report, let the entry be

Judgment for the plaintiff in the sum of \$3,500 and costs.

NEW ENGLAND IRON WORKS COMPANY & others vs. PAUL H.
JACOT & others.

Suffolk. November 18, 1915. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Equity Jurisdiction, Damages for breach of contract. Damages, In equity.

In a suit in equity, in which the only material question came to be whether the defendant was liable in damages and, if so, for what amount for failing to carry out the terms of a contract to supply a sum of money to a certain corporation

for a particular purpose, it appeared that the corporation was unable to pay its debts and already owed the defendant a large amount of money, that the defendant agreed to lend the corporation "such sum not exceeding \$25,000 as may be necessary to complete the second unit now in process of construction and to place the same in operation," that thereafter the defendant lent the corporation more than \$31,000, that about \$6,000 of this was expended in the construction of the addition to the plant of the corporation called the "second unit," about \$5,000 of it was spent on remodelling and repairs and the remaining amount of about \$20,000 was used in running the business, that, if this had not been done, the business would have been ruined, that it would have required \$11,000 more to have completed the second unit, but that the second unit, if completed, would have been useless if the business had come to an end during its construction. *Held*, that it had not been shown that the plaintiff had suffered any damage from the defendant's failure to carry out the terms of his contract, it being probable that, if he had complied strictly with his agreement, the plant would have been closed down for lack of working capital, so that the damages claimed by the plaintiff were too uncertain and speculative to be capable of ascertainment; and accordingly the bill was dismissed.

DE COURCY, J. This bill was brought by creditors to restrain the Federal Trust Company from foreclosing a mortgage held by it on the property of the Central Ice Manufacturing Company; and also to secure the specific enforcement of a certain written agreement of the defendant Jacot with the plaintiffs and other creditors of the ice company. Interlocutory decrees were entered confirming the master's original and first supplemental reports, dismissing the bill as to the Federal Trust Company, and recommitting the case to the master to ascertain and report the damages, if any, which the plaintiffs have sustained by reason of the defendant Jacot's failure to furnish funds in accordance with the written agreement referred to. The plaintiffs now waive all claims against the Federal Trust Company, and concur in the ruling that specific performance should not be ordered as against Jacot (who hereinafter is referred to as the defendant). The exceptions taken by that defendant to the original report also have been waived. This practically disposes of the main objects originally sought in the bill of complaint.

The material questions now before us * are those raised by the exceptions of the defendant Jacot to the master's second supplemental report. Before considering these it is necessary to set out certain material facts. On October 28, 1913, the Central Ice Manufacturing Company was in bad condition financially. In the opin-

* The case was reserved by *Bruley, J.*, for determination by the full court.

ion of the master, its property as a going concern was worth from \$75,000 to \$100,000 over the mortgage to the Federal Trust Company; but it had an outstanding indebtedness of \$248,865.52, of which \$170,066.05 was unsecured. The defendant Jacot already had invested in the plant and business the sum of \$182,087. As the result of negotiations a written agreement was entered into on that date, between the ice company, its other creditors and Jacot. One part provided for the exchange of preferred stock of the corporation for the claims of such creditors as would elect a settlement on that basis. The other part provided in substance for an extension for two years of the payment upon the claims of those creditors who preferred this adjustment, and meanwhile the payment to them *pro rata* of the surplus earnings. Among other things Jacot agreed "that he or his associates will loan to the company such sum not exceeding \$25,000 as may be necessary to complete the second unit now in process of construction and to place the same in operation." Since October 28, 1913, he has in fact advanced to the company the net amount of \$31,140.08. Of this sum \$5,781.68 was expended in the construction of the second unit, and \$4,917.42 was spent on remodelling and repairs. The master finds that \$11,000 is necessary to complete the second unit, so as to have it in good operable condition in conjunction with the first unit as it now exists.

On November 13, 1914, the trust company, as trustee under the mortgage, took possession of the premises and property of the ice company for the purpose of foreclosure; and it has since been in possession, and conducting the business of the company as mortgagee. The master finds that the Central Ice Manufacturing Company is now insolvent, its liabilities being in excess of its assets.

The defendant Jacot, by his exceptions to the supplemental report, seeks to raise mainly two questions, namely, whether there was a breach of the written agreement of October 28, 1913, and whether the master was in error in his rulings as to damages. In assuming that there was a breach by Jacot, the master acted within the terms of the interlocutory decree of June 22, 1915. The defendant's appeal from that decree cannot be sustained in view of the master's findings in his first report, in the absence of the evidence on which they were based. Although he did advance more than the \$25,000 required, the master finds that he "intentionally

failed or neglected" to see that it was applied to the construction of the second unit, and knew that a large part of it was being used for the running of the business.

But it does not necessarily follow that the plaintiffs were damaged by the defendant's failure to apply his money solely in the construction of an addition to the plant. His main contention is that it appears as matter of fact that they were not damaged thereby; and he argues further that the rule of damages adopted by the master is erroneous. As already appears, if the defendant, instead of loaning to the company \$31,000, as he did, had advanced only the \$5,781.68, which already has gone into the second unit, and the \$11,000 needed to complete it, and had seen to it that the money was so applied, there would have been no breach of his agreement. But it seems equally clear from the findings of the master that if Jacot had done just this, the business would have been ruined. He finds that "without additional capital being furnished, it would have been necessary, if \$25,000 out of the money which Mr. Jacot furnished had been used in building the second unit, to close the plant for four or five months." And, "if the ice company had been obliged to shut down for four or five months, the conditions in the summer of 1914 were such that, even if working capital had thereafter been provided, it would have been practically impossible to have built up a new business, and conduct it at a profit, before the filing of the plaintiffs' bill of complaint." Again, "the officers and directors of the company had certainly made strenuous and all reasonable efforts to obtain sufficient capital to keep the plant running, but without success."

When the creditors' agreement was made, October 28, 1913, the parties apparently believed that the building of the second unit was all that was necessary, in order to overcome the financial difficulties of the ice company. And, as pointed out in the master's last report, before the entry of the interlocutory decree denying specific performance, this suit was tried on the theory that if Jacot's loan had completed the second unit, the business would have been conducted at a sufficient profit to enable the ice company to pay its creditors at the end of the extension period, October 28, 1915. It is plain from the master's findings that this was a mistaken view. As was stated in the first report, "If the money which Mr. Jacot furnished had been used in completing the second unit, it would

have been necessary for the ice company either to shut down and temporarily discontinue business while the unit was being built, or else secure other working capital elsewhere. Practically the same problem exists today. The company cannot exist and do a successful business unless both conditions are met. The plant should be completed and working capital provided." Under these, and similar findings, the plaintiffs fail to show that they suffered any damage by the failure to use Jacot's money for the completion of the second unit. He was not obliged to furnish working capital. And without sufficient working capital the plant could not have been kept running, much less operated at a profit. And the report makes evident the fact that it was conjectural and very improbable that working capital could be obtained elsewhere to keep the business running, build a storehouse, and produce an output economically that could have been disposed of in a ready market at a profit. These and other contingencies of the business would have to be successfully met before the ice company could acquire any profits; and even then the application of such surplus to the claims of the plaintiffs would be determined by the business judgment of the directors, acting with a view to promote the interests of the corporation in the existing circumstances.

As was said by Rugg, C. J., in *John Hetherington & Sons, Ltd. v. William Firth Co.* 210 Mass. 8, 21: "The fundamental principle of law upon which damages for breach of contract are assessed is that the injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach, and so far as compensation therefor in money can be computed by rational methods upon a firm basis of facts." In view of the findings already mentioned — and which are not controlled by any others in the master's report — it seems plain that the contention of the plaintiffs, that their claims against the ice company have been lessened in value by the failure of the defendant Jacot to see to it that \$25,000 out of his \$31,000 loan to the company was applied to the construction of the second unit, rests chiefly on conjecture and speculation. This is true not merely as to some necessarily indefinite elements of damage, but as to the damages as a whole. The application to

the second unit of the \$11,000 needed to complete it, would not have assured the carrying on of the business, much less the earning of profits and the application of them to the plaintiffs' claims. On the contrary, the probabilities, as disclosed by the record, are that the plant would have been closed down for lack of working capital and the mortgage foreclosure hastened, if the defendant had strictly complied with his agreement. In short, whether the plaintiffs would have received anything on their claims if Jacot's contract had been kept is uncertain, contingent or speculative. 8 R. C. L. 438, 442. *Central Trust Co. v. Arctic Ice Machine Manuf. Co.* 77 Md. 202. *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519. *Howard v. Stillwell & Bierce Manuf. Co.* 139 U. S. 199. *Allis v. McLean*, 48 Mich. 428. See *John Hetherington & Sons, Ltd. v. William Firth Co.*, *ubi supra*, and cases cited.

We are of opinion that the defendant Jacot's first, second and fourth exceptions * to the master's report must be sustained. As this disposes of the vital controversy in the suit, it is unnecessary to consider the other defences argued, or to discriminate as to the several rights of the different plaintiffs. The bill is to be dismissed as against Jacot and the Federal Trust Company. No brief has been filed on behalf of the Central Ice Manufacturing Company; but as, apparently, it has not refused to deliver to the New England Iron Works Company or to Augustus Keough the shares of stock to which they became entitled under the so called exchange agreement, the bill should be dismissed as to that defendant also.

Decree accordingly.

H. T. Richardson, for the plaintiffs.

C. J. Martell, for the defendant Jacot.

* The first and second exceptions were based upon objections to the effect that the master had adopted an erroneous rule of damages. The fourth exception was founded on the following objection: "For that the master has found that the plaintiffs were entitled to damages which could only be correctly based upon the additional value that the completion of the second unit would give to the plant and its assets, and such additional value is necessarily a matter of pure speculation and uncertainty, and impossible of ascertainment for the purposes of assessing legal damages."

LAURA H. SMITH vs. SELECTMEN OF NORWOOD & another.

Suffolk. November 19, 1915. — March 3, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Prohibition, Writ of. Way, Public.

The writ of prohibition is not available for the review and setting right of consummated wrongs but only for the prevention of wrongful acts threatened or justly apprehended.

The function of the writ of prohibition is to restrain judicial or *quasi* judicial tribunals from exceeding their jurisdiction, and it is not available for the purpose of restraining executive, administrative or legislative officers or bodies from acting where they have no authority.

Where the selectmen and the superintendent of construction of streets of a town have given notice to a landowner to remove within thirty days all trees, fences and other property from a certain portion of his land, but have not entered upon or taken possession of his land for the purpose of constructing a way or authorized any one else to do so, and where they have not undertaken or determined to assess any betterment taxes upon his land, there is no occasion to grant a petition of the landowner for a writ of prohibition to restrain the assessment of betterments, because it does not appear that any such assessment is impending or designed.

RUGG, C. J. This petition for a writ of prohibition was heard upon the petition and answer,* it being agreed that all the facts set forth in the answer were true. It must be considered on that footing.

The ground of the petition is that the town of Norwood has attempted to take, for the purposes of a public way, land of the petitioner, by proceedings which are so defective as to amount to a nullity. These proceedings ended with a vote by the town on July 23, 1914. The respondents are the selectmen and the superintendent of construction of streets of that town. On June 1, 1915, the respondent selectmen gave notice to the petitioner to remove within thirty days all trees, fences and other property upon such land of the petitioner. But they have not entered upon or taken possession of the land for purposes of constructing the way, nor authorized any one else so to do; nor have they undertaken nor

* By *Braley, J.*, who ruled that the petition should be dismissed, and at the request of the petitioner reported the case for determination by the full court.

determined to assess any betterment taxes upon land of the petitioner or of any one else, and they "will not undertake to determine what special benefit or advantage, if any, the petitioner's remaining land, or any other land, has received for the purpose of assessing betterments, until said work of constructing said way has been completed as provided by law."

Manifestly, upon these facts no ground exists for the issuance of a writ of prohibition. The proceedings as to the location of this public way, if it be assumed that they involved any judicial faculty or power, have long been ended. Nothing more can be done and nothing is projected in that regard. They stand or fall upon the basis of facts accomplished months before this petition was filed.

The writ of prohibition is not available for the review and setting right of consummated wrongs, but only for the prevention of those threatened or justly apprehended as likely to come. The writ is preventive and not corrective. It looks to the future and not to the past. The function of that writ is to restrain excesses of jurisdiction intended to be committed by judicial or *quasi* judicial tribunals, officers and boards. It is not available for the purpose of restraining executive, administrative or legislative officers or bodies from acting where they have no authority.

The assessment of betterments by the respondent selectmen is the only possible judicial or *quasi* judicial function within the perspective of this petition. But the exercise of that power is not impending nor designed. Whether it will ever be undertaken is wholly conjectural. In any event, it is a long distance in the future. The road never may be constructed. The location may be allowed to lapse without entry. The road may be discontinued. If ever constructed, it may be so plain that no special benefit has been conferred upon the petitioner's remaining land that no attempt at betterment assessment will be thought of. There is, therefore, no assertion of intent or of power to exercise any judicial jurisdiction.

Without reaching the question whether there is any defect in the proceedings as to the location of the way, it is plain that there is no occasion to inquire into that subject by this petition. *Washburn v. Phillips*, 2 Met. 296. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50. *Lodge v. Fletcher*, 184 Mass. 238. See *Pickford v. Mayor & Aldermen of Lynn*, 98 Mass. 491.

There is nothing inconsistent with this conclusion in *Day v. Aldermen of Springfield*, 102 Mass. 310, where the facts were quite different.

Petition dismissed.

S. R. Cutler, for the petitioner.

J. A. Halloran, for the respondents.

ESTHER A. PORTER *vs.* OCEAN STEAMSHIP COMPANY OF
SAVANNAH.

Suffolk. January 10, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Bill of Lading. Carrier, Of goods. Contract, What constitutes, In writing.

Where a straight bill of lading under St. 1910, c. 214, §§ 4, 10, for the transportation of a box of clothing to a consignee in another State was accepted from the carrier by a local expressman whom the shipper had employed to deliver the box to the carrier, and the shipper thereafter kept the bill of lading for three months without making any objection to it, in an action by him against the carrier for an alleged misdelivery of the box causing the loss of its contents, the shipper cannot be allowed to show that there was a mistake in the address of the consignee as written in the bill of lading and that the box, although delivered at the address named in the bill of lading, was not delivered at the true address of the consignee which was marked plainly on the box; and, the carrier having performed the contract in writing by which the plaintiff is bound, the plaintiff cannot recover.

CONTRACT for the defendant's alleged failure to deliver a box of clothing valued at \$34.50, which was entrusted to the defendant at Boston for transportation and delivery to one Mary Williams of Munnerlyn in the State of Georgia. Writ in the Municipal Court of the City of Boston dated January 25, 1912.

On appeal to the Superior Court the case was tried before *Hitchcock, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to make the following rulings:

"1. Upon the pleadings and all the evidence in the case, the plaintiff is not entitled to recover, and the verdict must be for the defendant.

"2. Upon all the evidence in the case, the duty of the defendant

was to deliver the goods in question to Mary Williams of Waynesboro, Georgia, and if the jury believe that the defendant did deliver or cause to be delivered the property entrusted to it by the plaintiff to Mary Williams of Waynesboro, Georgia, the defendant had performed its full duty in the premises, and the verdict must be for the defendant.

"3. The defendant performed its contract with the plaintiff by delivering the goods to Mary Williams of Waynesboro, Georgia. Whether the plaintiff in the case at bar meant Mary Williams of Waynesboro, Georgia, or Mary Williams of Munnerlyn, Georgia, is not material. The rights of the parties depend upon what is communicated to the carrier.

"4. There is no evidence in the case that the consignor, the plaintiff in this action, ever communicated to the defendant that she desired the box of clothing entrusted to the defendant to be delivered to any other person than Mary Williams of Waynesboro, Georgia, and, if the jury believe upon the whole evidence that the box was delivered to Mary Williams of Waynesboro, Georgia, the verdict must be for the defendant.

"5. The defendant requests the court to instruct the jury that upon the pleadings and all the evidence in the case, the only contract between the parties is to be found in the written and printed bill of lading issued by the defendant to the plaintiff and containing the name 'Mary Williams, Waynesboro, Ga., County of Burke' as the consignee; and to further instruct the jury that the written contract is not to be varied, enlarged, or changed by oral evidence."

The judge refused to make these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$42.82. The defendant alleged exceptions.

A. H. Russell, for the defendant.

J. T. Maguire, (*J. M. Browne* with him,) for the plaintiff.

BRALEY, J. The plaintiff bases her cause of action upon a contract of shipment made in this Commonwealth, and, if the straight bill of lading issued by the defendant states the contract, the goods having been delivered in accordance with the shipping directions therein, the action cannot be maintained. *Singer v. Merchants Despatch Transportation Co.* 191 Mass. 449. Uniform bills of lading act, St. 1910, c. 214, §§ 4, 10.

The undisputed facts are, that when the expressman, engaged for this purpose by the plaintiff, delivered the box of clothing it was plainly and distinctly marked, "Mary Williams, Munnerlyn, Georgia, Burke County," the name and place of residence of the plaintiff's sister for whom the goods were intended. And, upon receiving the box with payment of the charges of transportation, the bill of lading issued to and accepted by the expressman gave his name as the shipper and the name of the consignee as "Mary Williams Destination, Waynesboro State of Ga. County of Burk," to whom the goods were ultimately delivered. The same day the plaintiff paid the expressman, received the bill of lading, and from her own testimony it appears that, although she knew the goods were billed for Waynesboro, she neither protested, nor endeavored to repudiate the bill of lading until some three months later, when, having been informed of what had been done, she notified the defendant, that because the directions on the box had not been followed there had been a misdelivery causing the loss of the goods, for which reimbursement was demanded.

If no bill of lading had issued and been accepted at the time of shipment, this position would be well taken, for upon acceptance of the goods and payment of the charges an oral contract of affreightment could have been found. But, neither the plaintiff nor her agent having made any objection to its terms, and no fraud appearing, nor evidence of the making of any previous agreement, the defendant had the right to rely on the bill of lading concurrently issued as expressing the entire contract, which cannot be varied by parol testimony. *Boynton v. American Express Co.* 221 Mass. 237, 240. 4 R. C. L. Bills of Lading, § 22.

While the plaintiff, as an undisclosed principal from whom the consideration moved, can sue in her own name to enforce the rights her agent acquired when acting in her behalf, she cannot affirm in part and disaffirm in part. *Eastern Railroad v. Benedict*, 5 Gray, 561, 562. *Union Freight Railroad v. Winkley*, 159 Mass. 133, 135. *Boynton v. American Express Co.* 221 Mass. 237.

The jury accordingly should have been instructed, as asked in the first request, that upon the pleadings and the evidence the plaintiff could not recover. *Hoadley v. Northern Transportation Co.* 115 Mass. 304. *Samuel v. Cheney*, 135 Mass. 278. *Singer v.*

Merchants' Despatch Transportation Co. 191 Mass. 449. *Merchants Despatch Transportation Co. v. Furthmann*, 149 Ill. 66.

Exceptions sustained.

PHILIP RUBENSTEIN, trustee in bankruptcy, vs. LOUIS LOTTOW.

Suffolk. January 11, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Bankruptcy, Unlawful preference. Fraud. Wrongdoer without Remedy.

In determining whether a bankrupt was insolvent at the time of making an alleged unlawful preference, it is right in computing the bankrupt's assets and liabilities to add to the personal debts of the bankrupt the debts of a partnership of which he was a member and for the debts of which he was liable jointly with a partner besides individually because he had agreed to pay the debts of the partnership on its dissolution.

Under the provision of § 60 a of the bankruptcy act of 1898 as amended, that "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," the effect of the enforcement of the transfer referred to is the effect it will have at the time the petition in bankruptcy is filed.

The provision of § 60 b of the bankruptcy act of 1898 as amended, that if a person to whom a transfer defined as a preference is made "shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person," means that a transfer is voidable if the person to whom it was made had reasonable cause to believe that the transfer would result in a preference if enforced at the time of bankruptcy.

Under § 60 b, above named, mere ground for suspicion is not "reasonable cause to believe."

Under that section it was *held* that a defendant to whom a preference was made had reasonable ground to believe that a certain transfer would result in a preference, where, among other facts, it appeared that the defendant was the uncle of the bankrupt, had aided him in his business ventures, had made frequent examinations of his books of account, had advanced money to him on an assignment of accounts immediately preceding the bankruptcy, and in general had been intimately familiar with the bankrupt's commercial standing.

The decision of this court at a previous stage of this case reported in 220 Mass. 156, to the effect that, where a creditor, who had secured from his insolvent debtor a transfer of property, the enforcement of which would result in a preference, surreptitiously had advanced sums of money to such insolvent debtor in return for assignments of accounts, for the express purpose of tiding the insolvent debtor

over the period of four months necessary to protect the preference from avoidance under the bankruptcy act, which purpose failed by reason of the filing of a petition in bankruptcy within the four months, the trustee in bankruptcy in a suit in equity against such creditor can recover the value of the accounts thus assigned without returning the money received for such accounts by the bankrupt, here was affirmed on the ground previously taken that the acts of the creditor were a fraud upon the law, because the accounts were assigned and the money was paid for them in an unlawful attempt to circumvent the bankruptcy act.

RUGG, C. J. This case was considered in 220 Mass. 156, where the facts as they then appeared are stated at length. In accordance with the rescript there ordered, a new trial has been had upon certain issues. The facts now disclosed, new or different from those there set forth and material to the present decision, will be adverted to, so far as necessary. Several questions are presented.

1. Were the book accounts assigned to the defendant the property at that time of Setlin, the bankrupt, or of the firm of Setlin and Smith, of which he was a member? The trial judge,* after a hearing at which the various persons who knew the facts have testified orally before him, has found that these accounts were the property of Setlin. Under the familiar rule, that a finding will not be disturbed unless plainly wrong, although it is the duty of this court to examine the printed evidence and decide the case according to its judgment, giving due weight to the conclusions of the magistrate who saw the witnesses. A careful examination of the record convinces us that this finding ought to stand. It is not necessary, however, to analyze or to recapitulate the testimony. *Jennings v. Demmon*, 194 Mass. 108. *Sawyer v. Clark*, 214 Mass. 124. *Rubenstein v. Lottow*, 220 Mass. 156, at page 165.

2. The second question is, whether Setlin was insolvent at the time of the assignment of these book accounts. The trial judge found that he was. This finding is assailed on the ground that in making the account of Setlin's assets and liabilities, the debts of the partnership of Setlin and Smith, of which Setlin was a member, for the debts of which he of course was liable jointly with his partner, and whose debts on its dissolution he had agreed to pay, were added to Setlin's personal debts. In this there was no error of law. It was the correct way to ascertain the entire indebtedness of Setlin. *Francis v. McNeal*, 228 U. S. 695, 700.

* *Morton, J.*

3. The third question is, whether the effect of the transfer of these book accounts to the defendant "will be to enable" him to obtain a greater percentage of his debt than other creditors of the same class.

It was held, when the case was here before, that individual creditors and partnership creditors were not of the same class. Following and applying that decision, the trial judge found that "If the effect of the enforcement of the transfer to Lottow be determined as of July 30, I find that Lottow would not obtain a greater percentage of his debt than other creditors of the same class. If the said effect is to be determined as of October 3, I find that it would be to enable Lottow to obtain much greater percentage." An examination of the evidence discloses no reason why this finding of fact should be overturned. The question of law which arises in the light of these facts is whether in bankruptcy the preferential character of a transfer of property is to be determined as of the date of the transfer, July 30, 1912, or as of the date of the filing of the petition in bankruptcy, October 3, 1912.

We are of opinion that the judge ruled rightly that the decisive date was that of filing the petition.*

As a matter of verbal construction, the governing section of the bankruptcy act leads to this conclusion. The pertinent words of the bankruptcy act are in a footnote.† They express futurity. Whether "the effect of the enforcement" of the transfer "*will be to enable*" one creditor to get a larger percentage of his debt than other like creditors, by implication reaches forward to a time

* The ruling and finding of *Morton, J.*, were as follows: "I rule as matter of law that the effect of the enforcement of said transfer is to be determined as of October 3. I further rule and find that the effect of its enforcement, will be, to enable Lottow to obtain a greater percentage of his debt than any other of Setlin's creditors of the same class. Said transfer then operated as a preference, and Lottow on July 30, 1912, knew or had reasonable cause to believe that this transfer did, and the enforcement thereof would, effect such a preference on October 3, 1912."

† U. S. St. 1898, c. 541 (30 U. S. Sts. at Large, 544), as amended, (32 U. S. Sts. at Large, 797, 34 U. S. Sts. at Large, 267, 36 U. S. Sts. at Large, 838,) "Sec. 60. Preferred Creditors.—a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

when an authoritative distribution can be made. Not until then can the respective percentages be determined with conclusiveness. If the time of the transfer had been the crucial time, the word "enables" naturally would have been used instead of the words "will be to enable" found in the act. The words "effect of the enforcement of such . . . transfer" also import adjudicated bankruptcy rather than the time of transfer. There can be no occasion for an "enforcement of such . . . transfer" until a petition in bankruptcy. A transfer of property by a debtor to his creditor apart from statute takes effect and is enforced automatically at once. There is no fraud at common law about such transfer not exceeding in value the amount of the debt, even though a preference of one creditor over another is thereby produced. *Lyon v. Wallace*, 221 Mass. 351. It needs no procedure to enforce it, but becomes enforced by the mere transfer. A question touching its enforcement does not arise until adjudicated bankruptcy intervenes. "The effect" of the enforcement cannot be settled until then. It seems indubitably to follow that its effect must be decided upon conditions as they then exist. The words "creditors of the same class" betoken adjudicated bankruptcy as the time for the application of the test. These words have no meaning except in connection with administration in bankruptcy. There are no classes of creditors at common law outside the bankruptcy act.

The bankruptcy court necessarily decides what the percentage then due to other creditors of all classes will be. That is one of the essential steps in its procedure. It would seem a strange anomaly to compel that court to try and decide another question of percentages relating to another time. If the defendant's contention is sound, the bankruptcy court well might be required, in the case of successive preferences, to enter into prolonged investigations as to the precise ratio to each other of the bankrupt's debts and liabilities at numerous different dates within the four months' period preceding the filing of the petition. Such judicial investigations inevitably would cause expense to the public and to the trustee representing the other creditors, and could confer no advantage on the debtor. They could benefit no one except a creditor who had accepted a preference, having reasonable cause to believe that he thereby was securing a preference from a bankrupt debtor. It cannot be presumed that such extreme solicitude at such

cost would be manifested by the law for such a creditor, in the absence of words expressing an unmistakable purpose to that end. The words of the act disclose no such design. On the contrary, they tend in the opposite direction.

The interpretation urged would result in inequality of distribution of the debtor's assets among his creditors. Equality of distribution is one of the fundamental objects of a bankrupt law. The indebtedness of a business man often gradually progresses from a nascent state of insolvency to the point where a petition in bankruptcy is filed. Beginning with a bare excess of debts over assets, he may go through the gamut to a very large and disproportionate excess in this respect. Preferences during such a period of declining ratio of assets to debts, adjusted according to the theory of the law now put forward, would result in a sliding scale of inequality between the various preferred creditors, as well as inequality between all creditors who have obtained preferences and the general creditors who depend upon the equality of the law to protect their interests against the alertness of creditors seeking unequal advantages through their own keenness in scenting approaching bankruptcy.

A plausible argument in favor of the defendant's contention is grounded on the provision in § 60 b, that one element of a voidable preference is that the person receiving the transfer "shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference." U.S. St. June 25, 1910, c. 412, § 11, (36 U. S. Sts. at Large, 842). In this connection the intent of the debtor is not now significant. The only elements required by the act are the fact of insolvency at the time of the transfer and the excessive percentage of his debt acquired by the creditor in enforcing the transfer. *Wilson v. Mitchell-Woodbury Co.* 214 Mass. 514. But it is urged that a creditor cannot have a reasonable cause to believe that his conduct in receiving a transfer would effect a preference in the future, and that such cause to believe can be predicated only upon a then present and existing state of affairs. It seems to us that the answer is that a reasonable cause to believe that the transfer will result in a preference if enforced at the time of bankruptcy is the precise meaning of this provision. A creditor, conceivably in accordance with facts, might believe that the transfer would give him only an equal share with other creditors of the same class of the estate of his debtor upon immediate bankruptcy,

and yet have every reason to believe that upon postponement of the bankruptcy to some later date during the succeeding four months he would secure a disproportionately large share. It does not seem to us that to hold such a transfer valid would accord with the general purpose of the act. A creditor rightly may believe that the result of the transfer to him may be an ultimate preference when bankruptcy comes, although not one at the moment. The degree of insolvency preceding a petition in bankruptcy is often progressive, and that fact usually must be within the contemplation of the ordinary business man accepting a transfer from his bankrupt debtor. The law well may take account of this circumstance. We think a transfer under such conditions becomes voidable by the trustee if the other necessary elements are present.

It follows that the standard established by the words of the act in this connection is that of practical results. It does not justify resort to the uncertainties of theoretical inquiry as to what might have happened if bankruptcy had come at a different time from that when it actually did come.

The conclusion drawn from an examination of the words of § 60 is confirmed by general considerations. The great aim of the bankruptcy law is to provide a simple and expeditious method of distributing the assets of a bankrupt equally among his creditors as inexpensively to all parties in interest as is consistent with the accomplishment of the end in view. That aim would be frustrated in almost every particular by adopting the construction of the law urged by the defendant. It necessarily would involve complexity of inquiry, delay, inequality of distribution among creditors of the same class dependent upon the precise state of the bankrupt's financial condition at the date of each preference, and added expense both to the public and to the parties in interest.

This conclusion does not in any degree conflict with general expressions to be found in many decisions relied on by the defendant, which need not here be reviewed, to the effect that whether there has been a preference or not is to be determined as of the date of the transfer or payment. Of course that is the crucial moment in determining other factors which go to make up a preference, as, for example, whether the debtor was bankrupt and whether the creditor had reasonable cause to believe him to be bankrupt. Such expressions in judicial opinions were not directed to the point here

raised and have no authoritative weight when wrested from their context and the point under discussion in the connection in which they occur. *Swan v. Justices of the Superior Court*, 222 Mass. 542.

While the precise point here presented does not appear to have been decided, the result we have reached is in harmony with what has been assumed in numerous cases. *Clarke v. Rogers*, 228 U. S. 534. *Swarts v. Fourth National Bank*, 54 C. C. A. 387. *Kimmerle v. Farr*, (111 C. C. A. 27) 189 Fed. Rep. 295, 298. *Brittain Dry-Goods Co. v. Bertenshaw*, 68 Kans. 734.

4. The fourth question is, whether, at the time of the transfer to him, the defendant had reasonable cause to believe that its enforcement would effect a preference. The trial judge found that he did. The law is plain. The defendant must have had reasonable cause to believe. Mere ground for suspicion is not enough. *Batchelder v. Home National Bank*, 218 Mass. 420, 422. *Putnam v. United States Trust Co.*, ante, 199. *Grant v. National Bank*, 97 U. S. 80. The question, whether he had such reasonable cause to believe, is one of fact. Ascertainment of the ultimate fact depends upon all the circumstances disclosed by the credible evidence and the inferences of which it rationally is susceptible. An elaborate and able argument has been addressed to us, undertaking to demonstrate that the evidence does not support this finding. But a careful examination of the record satisfies us that it must stand. It is not necessary to go through the testimony in detail and allude to all the reasonable inferences which flow therefrom. It is enough to say that the defendant was the uncle of the bankrupt, had aided him in business ventures, had made frequent examinations of his books of account, through his trusted agent had advanced money to him on an assignment of accounts during the four months immediately preceding the bankruptcy and, in general, appears to have been intimately familiar with the bankrupt's commercial standing.

5. The defendant has argued that the paragraph (3)* of the final

* The paragraph referred to is as follows: "(3) That the defendant, Louis Lottow, be, and he is hereby ordered to pay to the plaintiff the sum of \$648.63 with interest thereon from December 3, 1912, amounting to \$100.32 or a total of \$748.95; and that within ten days from the date of this decree he assign to the plaintiff so much of the book accounts assigned to William Sedlis by Julius Setlin as are now uncollected, and not assigned by Sedlis in accordance with a decree of this court dated May 7th, 1915, which uncollected

decree is wrong, although conceding that it is strictly in accordance with the terms of the previous opinion. He asks in substance for a reversal of that portion of the earlier decision. In brief, it there was held that, when a creditor who had secured from his insolvent debtor a transfer of property the enforcement of which would effect a preference under the bankruptcy act, surreptitiously advanced sums of money to that insolvent debtor in return for assignments of accounts, for the express purpose of tiding the insolvent over the period of four months so that the preferences would become impregnable against attack under the bankruptcy law, which purpose had failed through supervening bankruptcy, the trustee in bankruptcy could recover the value of the accounts so assigned without first returning the money received by the insolvent. Such a transaction was held to be a fraud on the law. It is something more than a mere preference. It is a design to circumvent a law for the equitable distribution of the property of a bankrupt. It is a wrong quite outside any express prohibition of the bankruptcy act. The point was so decided upon the principle of numerous more or less closely analogous decisions there collected. See 220 Mass. 168, 169. Those like *Allen v. French*, 180 Mass. 487, are alone very nearly, if not quite, decisive. There appears to us to be nothing inconsistent with this conclusion in *Van Iderstine v. National Discount Co.* 227 U. S. 575; *Coder v. Arts*, 213 U. S. 223, 241; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 365, and other cases relied on by the defendant. The point has been considered again and is reaffirmed, although it had become the law of the case, as well as established under the doctrine of *stare decises*. *Boyd v. Taylor*, 207 Mass. 335.

Decree affirmed with costs.

Lee M. Friedman, (S. J. *Freedman* with him,) for the defendant.

D. A. Ellis, (P. *Rubenstein* with him,) for the plaintiff.

book accounts now amount to \$159.23; and that the plaintiff retain the sum of \$112.22 now in his possession, which sum was received and collected by him on said book accounts since the entry in this case of the rescript of the Supreme Judicial Court (the total uncollected book accounts then amounting to \$271.45) and that the plaintiff hold title to said sum of \$112.22 in his capacity as trustee in bankruptcy."

SOPHIA PERKINS vs. BAY STATE STREET RAILWAY COMPANY.

Essex. January 11, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Street railway, Res ipsa loquitur. Evidence, Presumptions and burden of proof.

In an action against a street railway corporation for personal injuries sustained when the plaintiff was a passenger in a car of the defendant by reason of an alleged dangerous construction and arrangement of the iron threshold of the door of the car, where the car was a new one and the plaintiff did not contend that it was in any way out of order, and where the plaintiff was injured by reason of the heel of her boot catching between the iron guides on the threshold, the mere happening of the accident is no evidence in itself of negligence on the part of the defendant, and the burden is on the plaintiff to show by affirmative evidence that the defendant failed to use due care in equipping the car.

The use by a street railway corporation in a semi-convertible car of an iron threshold having guides a quarter of an inch high between which the door of the car slides, such thresholds having been in common use for a number of years on other street railway systems, combined with the fact that a woman passenger in leaving the car caught the heel of her boot between the iron guides and was injured, furnishes no evidence of negligence in an action by such passenger against the corporation for her injuries.

TORT for personal injuries sustained by the plaintiff on October 29, 1912, when the plaintiff was a passenger on a semi-convertible street railway car of the defendant with sliding doors at both ends, by reason of the alleged unsafe condition of the threshold of a door of the car. Writ dated December 2, 1913.

In the Superior Court the case was tried before *Bell, J.* It was not contended that the plaintiff was not in the exercise of due care. At the close of the evidence, which is described in the opinion, the defendant asked the judge to make the following rulings:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. There is no evidence of negligence on the part of the defendant, its servants, agents or employees."

The judge refused to make these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,000. Thereupon the judge reported the case for determination by this court. If the judge was right in submitting

the case to the jury, there was to be judgment on the verdict; otherwise, judgment for the defendant.

The case was submitted on briefs.

S. Parsons & H. A. Bowen, for the defendant.

W. E. Sisk & R. L. Sisk, for the plaintiff.

BRALEY, J. It has been repeatedly stated that the duty of a common carrier of passengers whether by land or water is to furnish suitable vehicles or vessels for the safe carriage of travellers with such reasonable accommodations as usually are provided on similar conveyances. *Marshall v. Boston & Worcester Street Railway*, 195 Mass. 284, 286, 287, and cases cited. 4 R. C. L. Carriers, §§ 524, 586. And where, as in the case at bar, a passenger in the exercise of due care is injured through the alleged negligence of the carrier in not providing safe and sufficient means of transportation, the question is whether that degree of care which prudent competent persons would have used under similar conditions to avoid the occurrence of such accidents has been exercised. *LeBarron v. East Boston Ferry Co.* 11 Allen, 312, 315.

It appears from the record that when leaving the car, which was of the semi-convertible type, the plaintiff caught the heel of her boot in the cleats on guides at the iron threshold of the door causing her to be thrown into the vestibule and severely injured. The car was new and no contention is made that it was defective or out of repair, but the plaintiff contends that the construction and arrangement of the threshold were faulty and unsafe. It is to be observed that no part of the car gave way. The mere happening of the accident therefore affords no presumption of negligence, and the burden was on the plaintiff to introduce some affirmative evidence from which the jury could find that the defendant had failed to use due care in the equipment of its railway. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536. *Carney v. Boston Elevated Railway*, 212 Mass. 179.

The material facts not in controversy are, that cars of this type having iron thresholds consisting of one casting with a series or row of cleats or guides a quarter of an inch in height above the surface through which the doors ran closing in the centre, had been in common use for a number of years on other street railway systems. And in the absence of proof of information or of reasonable knowledge from experience that injury to passengers

was likely to happen from their use, there is no evidence from which the jury could say the defendant should have foreseen, that, with everything plainly visible, passengers using the thresholds ordinarily might be expected to stumble and fall from contact with the cleats or would be caught "between the cleats and the floor of the car." If the construction was not mechanically improper or defective, and no practicable method having been suggested of guarding against the use of such thresholds in the usual way except to discontinue the use of that kind of car, there was no positive evidence from which negligence could be found. The plaintiff's injury resulted from an accident under circumstances where the defendant had taken every reasonable precaution. *Adduci v. Boston Elevated Railway*, 215 Mass. 336, 337, *ad finem*.

The jury should have been instructed that the action could not be maintained, and in accordance with the terms of the report judgment is to be entered for the defendant.

So ordered.

MARTIN O'BRIEN & another vs. GRAND LODGE OF THE ANCIENT
ORDER OF UNITED WORKMEN OF MASSACHUSETTS, MARGARET
T. SCANNELL, claimant.

Suffolk. January 12, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Fraternal Beneficiary Corporation. Interpleader. Contract, Implied in law.

Where under a certificate issued by a fraternal beneficiary corporation a death benefit was due, but the person named in the certificate as beneficiary had died before the member and no other beneficiary had been designated by him, and it was provided by the by-laws subject to which the certificate was issued that, if no beneficiary was living and certain near relations were not living, the benefit should be paid to the "legal heirs" of the member, and where it appeared that the member had promised orally to his stepdaughter that the benefit should be paid to her, if she would pay the premiums and assessments on the certificate, and she had done so for fifteen years and up to the time of his death, it was *held*, that the benefit must be paid to the member's heirs at law.

In an action of contract against a fraternal beneficiary corporation for a death benefit, the defendant admitted its liability and paid the money into court, and

at its request a person who had paid the premiums and assessments on the member's certificate for many years and claimed to be entitled to the death benefit was allowed to interplead. After certain questions had been answered by the jury, the trial judge reported the case to this court, "such judgment to be ordered as the facts and law require." This court, in holding that the plaintiffs as matter of law were entitled to recover the benefit, *held also*, that the plaintiffs and the claimant should be treated as interpleading under R. L. c. 173, § 37, and that the claimant's claim for reimbursement for money paid for premiums and assessments should be passed upon.

Accordingly in such action above described, which was brought by the heirs at law on the certificate for the death benefit, where the defendant had paid into court the amount of the benefit and had caused the stepdaughter to be made a party as claimant, and where it was evident that but for the payments of premiums and assessments made by the claimant all rights under the certificate would have lapsed and the plaintiffs would have got nothing, it was *held*, that the claimant was entitled to be reimbursed for the amount of such payments with interest thereon.

CONTRACT by the heirs at law and next of kin of Patrick A. Quinlan, deceased intestate, to recover the amount of a death benefit upon a certificate issued by the defendant. Writ dated March 30, 1914.

The defendant in its answer admitted that it issued a beneficiary certificate upon the life of Patrick A. Quinlan and admitted its liability in the sum of \$2,000. It alleged that Margaret T. Scannell, the claimant, made claim on the defendant for the whole or some part of the amount due upon the certificate, and that it had no interest in the subject matter. The defendant paid into court the sum of \$2,000, and, on request of the defendant, Margaret T. Scannell was allowed to interplead. She filed a claim containing three counts.

The first count in substance alleged that, in consideration that the claimant should pay the premiums and assessments on the beneficiary certificate, the deceased Patrick A. Quinlan during his lifetime promised the claimant orally that she should receive the proceeds of the certificate after his death.

The second count in substance alleged that at the request of Quinlan the claimant paid the premiums and assessments in consideration of Quinlan's promises that she should be reimbursed out of the proceeds for the amount of money paid on premiums and assessments.

The third in substance alleged that at the request of Patrick A. Quinlan the claimant paid the premiums and assessments on

the beneficiary certificate, wherefore she was entitled to be reimbursed out of the proceeds of the certificate.

In the Superior Court the case was tried before *Lawton, J.* The claimant was the stepdaughter of Patrick A. Quinlan. Her mother, the wife of Patrick A. Quinlan, was named as beneficiary in the certificate. She died on July 5, 1911. Patrick A. Quinlan died on December 21, 1911, having designated no other beneficiary.

The claimant testified that during the lifetime of her mother, and for fifteen consecutive years before the death of Patrick A. Quinlan, he frequently made oral promises to her that, if she would pay the premiums and assessments demanded by the defendant from time to time, at his death she would receive the whole amount of the beneficiary certificate. The claimant said that she did not want to be made the beneficiary of the policy while her mother lived.

Section 11 of Law XIX of the defendant was as follows:

"If one or more of the beneficiaries shall die during the lifetime of the member, the surviving beneficiary or beneficiaries shall be entitled to the benefit equally, unless otherwise provided in the Beneficiary Certificate; and if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other legal designation, and he shall leave a widow, and no minor children surviving him, the benefit shall be payable to his widow; if he leave a widow and a minor child, or minor children, surviving him, the benefit shall be paid to his widow and surviving minor child, or to his widow and such surviving minor children share and share alike; if he leave no widow surviving him, then said benefit shall be paid share and share alike to his children; his grandchildren living at the time of his death to take the share to which their deceased parents would be entitled if living; if there be no children or grandchildren of the deceased member living at the time of his death, then said benefit shall be paid to his mother, if living, and if she be dead at the time of his death, then to his father, if living, and should there be no one living at the death of the member entitled to said benefit under the provisions hereof, then the same shall be paid to his legal heirs."

Patrick A. Quinlan left no widow, no child, no grandchild, no mother and no father. The plaintiffs were his heirs at law.

The judge submitted to the jury four questions in writing, which, with the answers of the jury to them, were as follows:

"1. Did Mrs. Scannell and the intestate Quinlan enter into a contract to the effect that if Mrs. Scannell should keep the policy alive and in force by paying the dues and assessments thereon during the life time of said Quinlan, she should, in consideration therefor, receive the proceeds of the policy upon his death?" The jury answered, "Yes."

"2. Was such a contract in force at the time of said Quinlan's death?" The jury answered, "Yes."

"3. Did Mrs. Scannell perform in full her part of the contract?" The jury answered, "Yes."

"4. What sums, if any, with interest thereon, do you find Mrs. Scannell paid at the request of the intestate Quinlan by way of dues and assessments to keep alive the policy in question?" The jury answered, "\$745.28."

The plaintiffs asked the judge to charge the jury, that on all the evidence of the case, and as a matter of law the verdict should be for the plaintiffs. The judge refused so to rule. He denied a motion of the plaintiffs for a new trial and agreed to report the case; whereupon the parties waived further proceedings before a jury and submitted the case to the judge on the pleadings, the questions to and answers of the jury and the by-laws of the defendant. The judge found and ordered judgment for the claimant in the sum of \$1,992.17 and awarded costs to the defendant in the sum of \$7.83, with the further order that the case be reported for determination by this court, "such judgment to be ordered as the facts and the law require."

If the ruling was right, judgment was to be entered for the claimant on the verdict. If the claimant was entitled only to a reimbursement of the sums actually paid out by her for dues and assessments, with interest to the date of the verdict, judgment was to be entered for the claimant in the sum of \$745.28 and for the plaintiffs in the sum of \$1,246.89 and costs were to be allowed to the defendant in the sum of \$7.83. If the claimant was entitled to no recovery whatever, judgment was to be entered for the plaintiffs in the sum of \$1,992.17 and costs were to be allowed to the defendant in the sum of \$7.83. If the claimant was entitled to a reimbursement of the sums paid out by her for dues and assess-

ments without interest, to wit, \$492.04, judgment was to be entered for the plaintiffs in the sum of \$1,500.13 and costs were to be allowed to the defendant in the sum of \$7.83.

P. B. Kiernan, for the plaintiff.

A. P. Mills, (*D. E. Hall* with him,) for the claimant.

BRALEY, J. By the defendant's general laws and by-laws which were incorporated in the "beneficiary certificate" or contract, the original beneficiary, the wife of the assured, having predeceased him and no further designation of a beneficiary having been made, the plaintiffs as his sole heirs at law are entitled to the fund notwithstanding his parol promise to the claimant, his stepdaughter, that if she would pay the assessments as they fell due she should receive the proceeds of the certificate at his death. *Ulman v. United Order of the Golden Cross*, 220 Mass. 422, 427. *Pease v. Royal Society of Good Fellows*, 176 Mass. 506. *Daniels v. Pratt*, 143 Mass. 216. *American Legion of Honor v. Perry*, 140 Mass. 580. Pub. Sts. c. 115, § 8. St. 1882, c. 195, § 2. See R. L. c. 119, § 6.

But, if the plaintiffs' request that as matter of law they were entitled to a verdict should have been given, the case is before us on the report of the presiding judge under which justice may be done between the parties. The fund has been paid into court by the defendant, and the plaintiffs and the claimant should be treated as interpleading under R. L. c. 173, § 37.

It is evident that but for the payments which the claimant made, the certificate would have lapsed, and the plaintiffs would not have received anything. The advances were made on the express promise of the decedent under whom the plaintiffs claim, and, having been beneficial in the preservation of their property interests, the claimant should be reimbursed for both principal and interest. *Unity Mutual Life Assurance Association v. Dugan*, 118 Mass. 219. *Haggerty v. McCanna*, 10 C. E. Green, 48. *West v. Reid*, 2 Hare, 249. *Gill v. Downing*, L. R. 17 Eq. 316.

The cases of *Clark v. Royal Arcanum*, 176 Mass. 468, *United Order of the Golden Cross v. Merrick*, 163 Mass. 374, and *Clarke v. Schwarzenberg*, 164 Mass. 347, are plainly distinguishable. In the first case the suit was against the society to recover the amount of the certificate or the amount of assessments which the plaintiff had paid in reliance on the promise of her husband to transfer the certificate to her. It was held that no rights had been acquired in

the certificate, or to the proceeds by force of the agreement. See *Kerr v. Crane*, 212 Mass. 224, 226. In *United Order of the Golden Cross v. Merrick*, where there were rival claimants the court decided that the fraternal order could maintain a bill of interpleader, and in *Clarke v. Schwarzenberg* the plaintiff's right to reimbursement for premiums voluntarily paid was expressly left undetermined.

By the terms of the report the plaintiffs are to have judgment in the sum of \$1,246.89 with costs to the defendant taxed at \$7.83, while judgment is to be entered for the claimant in the sum of \$745.28.

So ordered.



MARY LACROIX, administratrix, vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 12, 13, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Release. Evidence, Presumptions and burden of proof.

In an action by an administrator against a corporation operating a street railway for conscious suffering of the plaintiff's intestate by reason of injuries sustained by him in being thrown from his wagon when run into by a car of the defendant, if the defendant introduces a release of the cause of action executed by the intestate, and the plaintiff admits its execution, merely denying that the words "I have read the above and agree to it" were written by the intestate, and if there is no evidence of illiteracy, mental incompetency, fraud, misrepresentation or coercion, a verdict must be ordered for the defendant.

CONTRACT by the administratrix of the estate of Edward La-Croix for the conscious suffering of the plaintiff's intestate by reason of injuries sustained on August 23, 1912, in being thrown from his meat wagon when run into by a car operated by the defendant on Cambridge Street in the part of Boston called Brighton. Writ dated March 11, 1914.

In the Superior Court the case was tried before *Stevens, J.* Among other defences the defendant relied on a release executed by the plaintiff's intestate which is referred to in the opinion, where the evidence in regard to it is described. At the close of the

evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. F. Warren, for the plaintiff.

E. P. Saltonstall, (*R. S. Pattee* with him,) for the defendant.

BRALEY, J. If, without deciding, it is assumed that there was evidence for the jury of the due care of the plaintiff's intestate and of the negligence of the defendant, the plaintiff cannot recover if the intestate released the cause of action.

It was admitted by the plaintiff that the release introduced in evidence by the defendant was duly executed, although she denied that the words "I have read the above and agree to it" were written by the intestate. But, whether they were inserted by his own hand or by the defendant's agent for the settlement of claims, is immaterial. It not having been shown that the intestate was illiterate, the releasor was bound by the instrument he voluntarily executed unless it was fraudulently obtained, or he was mentally incompetent. *McNamara v. Boston Elevated Railway*, 197 Mass. 383. *O'Regan v. Cunard Steamship Co.* 160 Mass. 356, 361.

A careful examination of the evidence however makes plain that at the time of execution he was in possession of his faculties and that no inducements were held out or any misrepresentations made or any coercion exercised.

The verdict for the defendant having been rightly directed, the exceptions must be overruled. *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 567.

So ordered.

JACOB M. TAYLOR vs. JOHN WEINGARTNER & another.

Suffolk. January 13, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Evidence, Allegations in pleadings, Self-serving statements, Presumptions and burden of proof. *Mortgage*, Of real estate: foreclosure sale.

In analogy to R. L. c. 173, § 85, which provides that in actions at law "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them," an allegation or denial in a bill in equity made by the

plaintiff in his own favor and sworn to by him, although it is an admission of the truth of the fact stated, cannot be used by him as evidence.

A mortgagee of real estate in making a foreclosure sale under a power contained in the mortgage not only must comply with the literal terms of the power but also is bound to use reasonable diligence to protect the rights and interests of the original mortgagor and also those of the owner of the equity of redemption to whom the mortgagor sold the property after making the mortgage.

Where a foreclosure sale of real estate under a power in a mortgage takes place after notice by publication and notice by mail to the original mortgagor and to the owner of the equity of redemption and after an adjournment of two weeks at the request of the owner of the equity of redemption, the mere facts, that the mortgagee was the only bidder at the sale and that the property brought less than its market value, do not make the sale invalid nor afford ground to the original mortgagor for maintaining a suit in equity against the mortgagee to enjoin him from suing for the balance due on the mortgage note after applying toward its payment the proceeds of the sale.

In a suit in equity by a mortgagor of real estate, after a foreclosure sale of the mortgaged property under a power of sale in the mortgage, to enjoin the mortgagee from suing the plaintiff for the balance due on the mortgage note after applying toward its payment the proceeds of the sale, where the plaintiff has alleged that the sale was not conducted fairly and in good faith and that if it had been so conducted the proceeds would have been more than sufficient to pay the note in full, the burden rests upon the plaintiff to prove these allegations.

It cannot be ruled as matter of law that notice by publication should have been given of a two weeks' adjournment of a foreclosure sale of real estate under a power in a mortgage, where ample notice was given of the time originally fixed for the sale and the adjournment was made by a proclamation of the auctioneer at that time.

CROSBY, J. The plaintiff on December 6, 1911, purchased from the defendant certain real estate situated in Boston. The premises were sold subject to a first mortgage thereon of \$10,000. The defendant, in addition to the conveyance of the real estate, paid the plaintiff \$1,200 in cash and received in return a deed of certain lots of land in Brighton, in the city of Boston, and a note for \$3,700 secured by a second mortgage on the real estate so conveyed to the plaintiff. This mortgage contained a power of sale in the usual form, one of its provisions being that the mortgagor "shall pay all taxes and assessments to whomsoever laid or assessed, whether on the granted premises, or on any interest therein."

About a year after the transactions above referred to, the plaintiff sold the real estate to one Ambler subject to the two mortgages, there being at that time \$3,400 unpaid upon the second mortgage. Shortly afterwards Ambler sold the premises to one Fulton subject to the first and second mortgages, and on March 29,

1913, Fulton sold the premises to one Nickerson subject to the first and second mortgages. At that time \$3,300 remained unpaid on the second mortgage; no instalments of principal or interest on the note secured by the second mortgage were then due, but the taxes assessed on the property as of April 1, 1912, with interest thereon, amounting all together to about \$300, were overdue and unpaid.

On April 7, 1913, the defendant made an entry upon the premises to foreclose the second mortgage for breach of condition for failure to pay the taxes assessed as of April 1, 1912, and thereafter he collected rents from the property amounting to \$141 up to May 29, 1913, when he caused the premises to be sold under the power contained in the second mortgage. Notice of the foreclosure sale was published in conformity with the terms of the mortgage, the sale being advertised to take place on May 15, 1913. On that date no bidders appeared and at the request of Nickerson, the owner of the equity of redemption, the sale was adjourned by the auctioneer until May 29, 1913, at ten o'clock in the forenoon. On May 29, at the time and place fixed for the sale, there were present the defendant and his attorney, the auctioneer, and Nickerson, the owner of the equity of redemption. The defendant bid \$800 for the property and, as there were no other bids, he was declared the purchaser and afterwards executed and delivered a deed under the power in the mortgage in which he was named as grantee. The defendant has since sold the premises subject to the first mortgage and taken a second mortgage for a part of the purchase price.

On June 18, 1913, the defendant brought an action against the plaintiff to recover the balance alleged to be due him on the \$3,700 note, which action is now pending. This bill is brought to enjoin the defendant from prosecuting the action upon the note. The plaintiff alleges that the foreclosure sale was not conducted fairly and in good faith by the defendant on account of which the property was sold for a grossly inadequate price, whereas if the defendant had conducted the sale with due regard for the rights of the plaintiff nothing would be due upon the note.

While the first prayer of the bill is that the foreclosure sale be decreed to be void, we do not understand that the plaintiff at the hearing before the judge of the Superior Court asked for such a

decree, but contended that the defendant should be held liable to account for the fair value of the property and that the plaintiff was entitled to a decree for the difference between such value and the amount for which the property was bid off by the defendant, and that such difference would equal or exceed the balance due on the note. We assume that the contention of the plaintiff before this court is the same as that made by him in the Superior Court.

A final decree having been entered in the Superior Court dismissing the bill, from which the plaintiff has appealed, it becomes necessary to consider in detail the findings of fact made by the judge * in his memorandum so far as they are said by the plaintiff to have been plainly wrong.

1. The finding that the notice of the sale which appeared in the Banker and Tradesman was read by the plaintiff's witness O'Hara was warranted. This witness so testified and there was no evidence to the contrary. It is to be noted that the judge neither found nor ruled that notice to O'Hara was notice to the plaintiff.

2. The judge found that notice of the sale was duly sent by mail to the plaintiff and that no denial of its receipt was made. This finding cannot be said to be plainly wrong. It was agreed that the defendant's counsel, Mr. Emery, if present, would testify that he mailed to the plaintiff at his Boston address a newspaper clipping of the notice of the foreclosure sale, that the notice was so mailed at the time of its publication, and that he (Emery) received no reply thereto. The plaintiff made no denial that he received such notice.

The suggestion of the plaintiff that the denial in the bill sworn to by him was evidence that he denied having received notice of the sale is not tenable. R. L. c. 173, § 85, provides that "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them." Allegations in a bill which is sworn to are admissions of the truth of the facts stated, but they are not affirmative evidence in favor of the plaintiff. *Elliott v. Hayden*, 104 Mass. 180. *Dennie v. Williams*, 135 Mass. 28.

3. The finding that actual notice was given to Nickerson, the

* *Pierce, J.*

owner of the equity of redemption, was not by implication or otherwise a notice to Taylor, nor did the judge so find.

4. The fourth assignment of errors raises the question whether there was a valid sale under the power in the mortgage. When the proceedings to foreclose the mortgage were instituted on April 23, 1913, it is plain that there existed a breach of the condition to pay the taxes. The undisputed evidence shows that the taxes assessed as of April 1, 1912, were past due and unpaid and that interest thereon had been accumulating since November 1, 1912, and the security of the mortgage was diminishing. If it be conceded that the defendant was bound to apply the rents received in payment of the taxes, it appears that the total amount of rents collected was much less than the amount of the tax. The contention of the plaintiff that the defendant was obliged to pay the tax before he had a right to foreclose the mortgage cannot be sustained. Under the circumstances disclosed by the evidence the defendant was entitled to proceed to foreclose his mortgage for breach because of the failure of the plaintiff to pay the tax assessed as of April 1, 1912. *Stevens v. Cohen*, 170 Mass. 551, 554. The defendant in executing the power was bound to exercise the utmost good faith for the protection of the rights of the owner of the equity of redemption as well as those of the plaintiff. *Boutelle v. Carpenter*, 182 Mass. 417. The mortgagee in the exercise of the power was bound not only to comply with its literal terms but was required to use reasonable diligence to protect the rights and interests of the owner of the equity of redemption and the plaintiff. *Bon v. Graves*, 216 Mass. 440, 446. *Briggs v. Briggs*, 135 Mass. 306, 309. *Dexter v. Shepard*, 117 Mass. 480. There was evidence to show that the notice of sale was published not only in the Boston Advertiser but also in the Banker and Tradesman, that notice was mailed to the plaintiff, and that the owner of the equity of redemption also had notice, that on May 15, the day fixed for the sale, it was adjourned for two weeks by direction of the defendant at the request of Nickerson, the owner of the equity, for the purpose of giving him an opportunity to pay the taxes, that, the taxes not having been paid, the sale was made on May 29. While the defendant was the only bidder, that fact is not sufficient to set aside the sale, nor does the fact that the estate brought less than its value as found by the court render it invalid. *Learned v. Geer*, 139 Mass. 31.

Stevenson v. Hano, 148 Mass. 616. *Fennyery v. Ransom*, 170 Mass. 303. *New England Mutual Life Ins. Co. v. Wing*, 191 Mass. 192. *Turansky v. Weinberg*, 211 Mass. 324. *Vahey v. Bigelow*, 208 Mass. 89. The evidence shows that the defendant complied in all respects with the power. There was also evidence to show that he endeavored to induce others to attend the sale and bid upon the property. On the other hand, while there was evidence to show that the plaintiff had notice of the sale, he did not attend nor does it appear that he did anything to protect his rights by attempting to procure the attendance of others or otherwise. *King v. Bronson*, 122 Mass. 122. So long as the plaintiff relied upon the allegations that the sale was not conducted fairly and in good faith, the burden rested upon him to show it. *Wadsworth v. Glynn*, 131 Mass. 220. *Vahey v. Bigelow*, 208 Mass. 89, 93.

We are of opinion that the notice of sale was valid and that the finding of the judge of the Superior Court that the sale was conducted in good faith and fully conformed to the terms of the power cannot be held to have been plainly wrong. It cannot be ruled as matter of law that notice of the adjournment should have been published in a newspaper or that the proclamation made by the auctioneer on May 15 was not sufficient. As was said in *Dexter v. Shepard*, 117 Mass. 480, at page 485, "A sale regularly adjourned is, when made, in effect the sale of which previous notice had been given." The sale was made only fourteen days after the time named in the original notice and there was evidence that the plaintiff had or might have had notice of the adjournment by the exercise of reasonable diligence for the protection of his interests. The facts in *Clark v. Simmons*, 150 Mass. 357, plainly distinguish that case from the case at bar. Upon this question of adjournment the memorandum of the judge contains the following: "I am unable to find that a further adjournment, even though accompanied by a new advertisement, would have resulted in the attendance at the sale of persons who would have paid a greater sum. Such a favorable result is pure speculation." See *Austin v. Hatch*, 159 Mass. 198.

5. The finding that the plaintiff did not contend that the sale was void or voidable and stipulated that for the purpose of the hearing at least it should be treated as valid and unimpeachable would seem to be justified in view of the colloquy between the

judge and the counsel for the plaintiff, but this becomes immaterial in view of our conclusion that the finding of the judge that the sale was valid was not plainly wrong.

6. The finding that the sale was conducted in good faith and fully conformed to the terms of the power is disposed of by what has been said previously.

7. The opinion expressed by the judge that the \$800 received should have been credited to the payment of the several instalments as they became due and that the action at law upon the note is premature was followed by the statement of the judge that he made "no order concerning the same, leaving the parties to such defence, if such there be, in the law action."

We are unable to see how any rights of the plaintiff were prejudiced by such statement.

8. The eighth, ninth, tenth and eleventh alleged errors stated in the plaintiff's brief are all disposed of by what has been said previously.

As it cannot be held that the findings of fact made by the presiding judge were plainly wrong, it follows that the entry must be

Decree affirmed with costs.

J. K. Berry, (E. C. Upton with him,) for the plaintiff.

J. G. Bryer, for the defendants.



GEORGE CREMIDAS vs. NATHANIEL W. FENTON & another.

Essex. January 13, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Nuisance. Equity Jurisdiction, To enjoin nuisance.

In a suit in equity against a manufacturer of mattresses to restrain him from maintaining an alleged nuisance in the operation of his factory to the alleged injury of the plaintiff and his family by noise and the vibration of the plaintiff's dwelling house, where it appeared that the neighborhood contained factories, stores and residences, that the plaintiff's house was an old and unsubstantial cottage that would be shaken even by a person walking across the floor, that the defendant had installed in his factory the most modern machinery of its kind which was operated by electricity, the least noisy motive power, and that the circumstances

of operation were not abnormal nor excessive, it was *held*, that the finding of a master, that the defendant was committing no nuisance in the operation of the machinery of his factory and that the plaintiff was not entitled to relief, could not be said as matter of law to be wrong.

BILL IN EQUITY, filed in the Superior Court on September 16, 1914, by the owner and occupant of a cottage house numbered 10 on Marianna Street in Lynn against manufacturers of mattresses maintaining a factory numbered 211 on Fayette Street in Lynn in the rear of and adjoining the plaintiff's premises, to restrain the defendants from continuing an alleged nuisance of noise and vibration injurious to the plaintiff and his family and for damages.

The case was referred to a master, who filed a report in which he made the findings stated in the opinion, and found that the defendants were committing no nuisance in the operation of the machinery in their factory and that the plaintiff was not entitled to the relief sought.

Later the case was heard by *Quinn, J.*, who made a final decree that the bill be dismissed, that the defendant Nathaniel W. Fenton recover from the plaintiff costs taxed at \$32 and that the defendant Mary A. Fenton recover from the plaintiff costs taxed at \$9.74. The plaintiff appealed.

F. E. Marble, for the plaintiff.

N. D. A. Clarke, for the defendants, submitted a brief.

BRALEY, J. The master not having been ordered to report the evidence, his findings of fact are final. *Taber v. Breck*, 192 Mass. 355. But, as he found "that the defendants are committing no nuisance in the operation of the machinery in their factory and that the plaintiff is not entitled to the relief sought," the plaintiff excepted to the master's report on the ground that this result is not sustained by the facts reported.

It appears that the neighborhood where the plaintiff's house and the defendants' factory are located is grouped around the edge of what was formerly known as "bog meadow," covering many acres. The section is not wholly residential, but of a mixed character consisting of factories, stores and residences, one of which the plaintiff owns and occupies as a dwelling house. It is found that he and his wife have been affected in some degree not only by the noise, but by the vibration of the house caused by the defendants. But the operation of the factory being lawful, and the master

upon all the facts reported being convinced that the noise would not be unbearable or injurious to the health of a normal person, no substantial injury warranting the assessment of damages or the issuance of an injunction closing the factory on this ground is shown. *Wade v. Miller*, 188 Mass. 6, and cases cited. *Stevens v. Rockport Granite Co.* 216 Mass. 486.

It is, however, urged that the plaintiff is entitled to relief for the annoyance and physical effect upon himself and wife and to damages for injury to his property arising from the vibration and jarring of the house in so far as attributable to the defendants' acts. While the fact found by the master, that the passing of heavy wagons or trucks in the street caused the house to oscillate, would be no justification for the defendants, because the public have a right to use the streets and abutters must suffer the annoyance of passing vehicles, yet he also found that the age and unsubstantial construction of the house are such, "that it would shake or jar . . . even by a person walking across the floor" and that this condition is unavoidable unless all operation of the machinery is suspended. If these findings did not appear, we should hesitate to say that of itself the mere character of the soil, which furnishes an unusually susceptible medium for the transmission of the effects of the motive power or mechanical force used at the factory, was sufficient to defeat appropriate relief. *MacNamara v. Taft*, 196 Mass. 597. *Hennesy v. Carmony*, 5 Dick. 616. But as the defendants "have installed the most modern machinery of its kind and . . . operate it by the least noisy of motive powers, namely, electricity," and the circumstances of operation are expressly stated as not being either abnormal or excessive, we cannot say as matter of law that the master's conclusion is wrong.

The exceptions accordingly must be overruled, but the decree should be modified by the taxation of but one bill of costs and when so modified it is affirmed.

Ordered accordingly.

ROBERT OLIVER vs. SAMUEL KALICK & another.

Middlesex. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Equitable Restrictions.

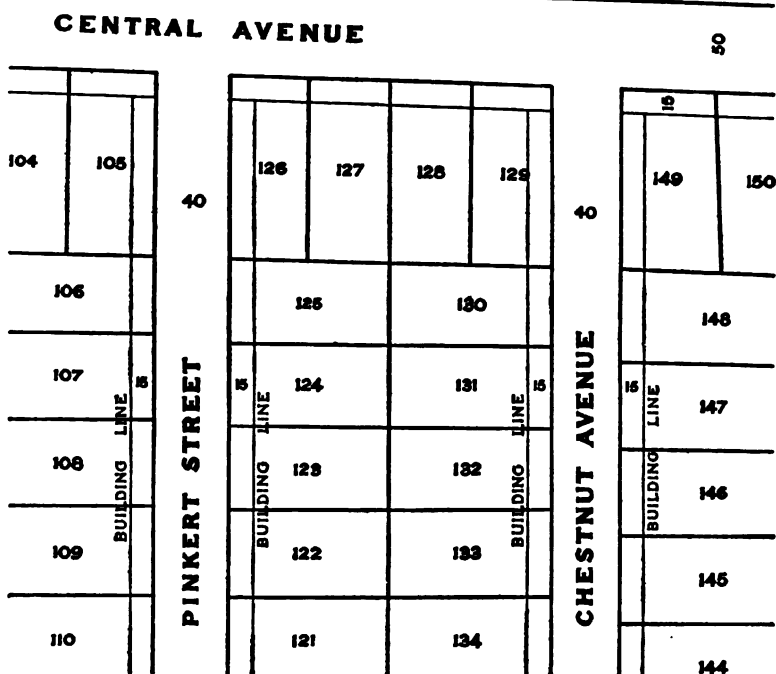
An owner of a tract of land sold it in lots laid out upon a plan, recorded in the registry of deeds, and conveyed the lots by deeds referring to the plan and imposing restrictions for the benefit of all the lots in accordance with a general scheme. The lots fronted on a street called Central Avenue and on a number of cross streets each leading from Central Avenue. One of the cross streets was called Chestnut Avenue. Upon the plan there was marked a line at each side of each of the cross streets passing across all the lots fifteen feet back from the street and marked "Building line." A similar line was marked across the lots fronting on Central Avenue, which also was fifteen feet back from that street but was not marked with the words "Building line." A lot at the corner of Central Avenue and Chestnut Avenue, which was the first lot conveyed, was conveyed to a predecessor in title of its present owner by a deed referring to the plan and containing the words, "This deed is conveyed subject to restrictions that no buildings shall be placed within fifteen feet of said Central Ave.," and the owner of this lot contended that the building restriction upon it was limited to Central Avenue, and proceeded to erect a building which extended to the street line of Chestnut Avenue. The owner of the next lot but one on Chestnut Avenue, whose deed contained a restriction that, "All buildings shall be set back at least 15 feet from Chestnut Avenue," brought a suit in equity against the owner of the corner lot to enjoin him from building within fifteen feet of Chestnut Avenue. *Held*, that in determining what was the restriction upon the defendant's land the language of the deed and the plan must be considered together, and that the defendant was bound by the building line marked on the plan which required a set back of fifteen feet on Chestnut Avenue as well as a like set back on Central Avenue.

CROSBY, J. In 1908 one McCormack, who was the owner of a tract of land in Medford, caused it to be surveyed and divided into house lots. A plan * designated the lots by numbers with a proposed street called Central Avenue extending along the northerly end of the tract and six other proposed streets running north and south across it. The plan was duly recorded in the registry of

* A copy of the material part of this plan is printed on page 253, in which, for the sake of simplicity, the numbers showing the dimensions of the lots are omitted. This copy shows parts of two of the six proposed streets leading from Central Avenue.

deeds. One of the cross streets is shown on the plan as Chestnut Avenue, but is now called Kenmore Road.

The defendants by mesne conveyances from McCormack are the owners of Lot 129 situated on the westerly side of Chestnut Avenue at the corner of Central Avenue. The plaintiff by mesne conveyances from McCormack is the owner of Lot 131 situated on the westerly side of Chestnut Avenue, Lot 130 being between the lot of the plaintiff and that of the defendant.



By a deed dated June 6, 1908, McCormack conveyed Lot 129 to John J. Dunn, the latter being a predecessor in title of the defendant. This was the first conveyance made by McCormack of any of the lots. This conveyance contains the following: "This deed is conveyed subject to restrictions that no buildings shall be placed within fifteen feet of said Central Ave." A deed from McCormack to George H. Loan, a predecessor in title of the plaintiff, is dated April 13, 1910, and besides other restrictions provides that "All buildings shall be set back at least 15 feet from

Chestnut Avenue." All the deeds under which the plaintiff and the defendants respectively claim title were duly recorded. The plan shows a line extending across the front of all the lots on each side of Chestnut Avenue fifteen feet inside the street lines. Each of these lines is marked on the plan "Building line." Similar building lines appear upon the plan on the lots shown on all the other streets which run north and south. On the south side of Central Avenue a similar line runs across all the lots, but the words "Building line" do not appear. All the deeds under which both parties derive title refer to the plan, and the lots so conveyed are described, not only by number, but are bounded by the adjacent lots. The plan with the deed in each case describes the land conveyed. As was said by this court in *Downey v. H. P. Hood & Sons*, 203 Mass. 4, at page 10, "The plan formed a part of the contract of sale, not only for the purpose of ascertaining the lot conveyed, but including the description of the appurtenant rights which were intended to attach. These particulars were incorporated by reference in each deed, as if they had been recited at length."

The defendants, at the time the bill in this cause was filed, were proceeding to erect a building on Lot 129, the easterly wall of which they had placed or were intending to place on the west line of Chestnut Avenue. They contend that the building restriction upon their lot is limited to Central Avenue.

On the other hand, the plaintiff contends that Lot 129 is subject to an equitable restriction that no building shall be erected within fifteen feet of either avenue.

We think it is plain that, when this tract was divided into building lots and a building line was established creating uniform restrictions applying to all the lots, a general scheme was intended for the benefit of all grantees and that such restrictions may be enforced in equity by each grantee for himself against the others. *Evans v. Foss*, 194 Mass. 513. The fact that in the deed from McCormack to Loan there are other restrictions besides that of the set back of fifteen feet from Chestnut Avenue is not inconsistent with the general scheme of the grantor. *Hano v. Bigelow*, 155 Mass. 341. *Bacon v. Sandberg*, 179 Mass. 396.

The defendants also contend that as the deed from McCormack to Dunn under which they claim title does not expressly refer to any building restriction on Chestnut Avenue, the reference to the

plan is not sufficient to create it. We cannot agree with this contention. The deed and the plan are to be considered together and that construction will be adopted which seems to be in accord with the intention of the parties as thereby expressed. *Bacon v. Sandberg*, 179 Mass. 396. The case of *American Unitarian Association v. Minot*, 185 Mass. 589, cited and relied on by the defendants, does not support their contention. In that case the clause in the deed in question provided that "the front line of the house to be built on the lot thereby granted shall be set back from the northerly line of Beacon Street as marked and layed down on said plan." A line upon the plan was marked "Front line of buildings." The precise point decided in that case was that as a matter of construction, the restriction created did not go beyond the house which should be first built. In that case this court said: "If the plan imports more than the deed, the provisions of the clause of the deed creating the restriction in which the parties have undertaken to define the extent of it must prevail over the characterization of the line on the plan referred to in the deed." In other words, if the language of the deed is clearly inconsistent with the plan, the former undoubtedly would govern. In the case at bar we do not construe the deed as necessarily inconsistent with the plan, but in entire accord with it. They are to be construed together. *Downey v. H. P. Hood & Sons*, *supra*. *Lipsky v. Heller*, 199 Mass. 310. *Sprague v. Kimball*, 213 Mass. 380, 383. *Kaatz v. Curtis*, 215 Mass. 311, 314. That the plan shows a building line on Central Avenue and Chestnut Avenue cannot be questioned. This line is marked "Building Line" on Chestnut Avenue. Why the line on Central Avenue was not similarly designated does not appear. It may be that it was not so marked because the line as drawn on the plan could not cross the intersecting streets. The deed under which the defendants claim, after referring to the plan, expressly states that the lot is subject to the restriction on Central Avenue. We are of opinion that such reference was so made to render it certain that the conveyance was subject to the restriction in the absence of words to that effect appearing on the plan and that such reference was not intended to exclude the restriction on Chestnut Avenue. It is apparent that the deed from McCormack to Dunn was drawn by a person unskilled in conveyancing. Where as here the whole tract was laid out with the evident intention of making

the restrictive building line apply to lots on both streets, it is not to be inferred in the absence of clear and positive evidence that the restriction on Chestnut Avenue was intended to be abandoned when the first lot was sold. There is no express language in the deed under which the defendants claim title indicative of such a purpose and we do not think it can be inferred because the restriction on Central Avenue was mentioned. It would seem plain that as the building line on the latter street was not so designated on the plan by specific words that the reference to it in the deed was for the purpose of supplying such omission rather than to relieve the lot conveyed of any restriction on Chestnut Avenue. This construction is not inconsistent with the language of the deed, but is in accord with it when considered in connection with the plan and is in harmony with the general scheme of the grantor for the improvement and development of the tract as a whole. We do not think that the decision in the *American Unitarian Association v. Minot, supra*, is inconsistent with the conclusion reached in the case at bar.

The defendants had constructive if not actual notice of the restriction to which their lot was subject before the acts complained of were committed by them. The presiding judge * has rightly found that the plaintiff has not been guilty of laches and we see no reason why he is not entitled to the relief which he seeks.

The decree of the Superior Court must be reversed and a decree with costs entered granting an injunction commanding the removal of the building or any other obstruction upon the lot within fifteen feet of the westerly line of Chestnut Avenue.

So ordered.

G. C. Scott, for the plaintiff.

F. P. Garland, for the defendants.

* *Wait, J.* He made a final decree that the bill be dismissed; and the plaintiff appealed.

KATHERINE GEARING vs. JOHN BERKSON & another.

PERCY A. GEARING vs. SAME.

Suffolk. November 29, 1915. — March 1, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Food. Sale, Of food. Contract, Implied. Sales Act. Negligence, In sale of unwholesome food.

Under the sales act, St. 1908, c. 237, § 15, as before at common law, if one buying meat at a shop relies on the skill and judgment of the dealer in selecting the meat and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, the dealer is liable to the buyer for damages resulting from his supplying unwholesome food. Following *Farrell v. Manhattan Market Co.* 198 Mass. 271.

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband.

If a dealer in meat undertakes to make a selection of pork chops to fill an order given to him by a woman on behalf of her husband, and selects unwholesome meat, the eating of which makes the woman sick, such selection is not, without more, negligence as a matter of law which would make the dealer liable in an action of tort brought against him by the woman for personal injuries so received and alleged to have been caused by his negligence.

Where a husband successfully has maintained an action of contract against a dealer in meat for damages caused by his being made sick because of eating meat of an unfit and unwholesome character selected by the defendant and delivered to the plaintiff's wife on his behalf, and also has recovered for expenses to which he was put by reason of sickness of his wife resulting from eating some of the same meat, and the wife is unable to recover from the dealer for her injuries in an action of contract, because the sale was not made to her, or in an action of tort, because she is unable to show that the defendant was negligent, neither spouse has a right to recover for the loss of consortium.

TWO ACTIONS OF CONTRACT OR TORT, the plaintiff in the second action being the husband of the plaintiff in the first. The first count in each action recited in substance that the plaintiff Katherine purchased pork chops of the defendants, leaving it to them to make the selection and paying the current price for wholesome

food, and that both plaintiffs ate of the chops and became sick. The second count in the first action sought recovery for loss of consortium due to the sickness of the plaintiff Percy, and the second count in the second action sought to recover both for medical attendance and expenses and for loss of consortium due to the sickness of the plaintiff Katherine. In the first action there was an additional count, added by amendment and called a second count, alleging that the sale of the unwholesome food which caused the plaintiff's sickness was due to negligence of the defendants. Writs in the Municipal Court of the City of Boston dated March 18, 1914.

In the Municipal Court the judge found in substance that on February 5, 1914, the plaintiff Katherine gave an order for the pork chops to the defendant Freshman, in charge of the defendants' business, whose duty it was to wait upon customers and make sales of meat for food; that the selection of the meat was left by her to the defendant Freshman; that Freshman undertook to make selection of the pork chops and to fill the order given by the plaintiff Katherine; that the defendant Freshman from the stock of the defendants selected some pork chops, and weighed and delivered them to the plaintiff Katherine; that she, believing them to be wholesome and fit for food, paid for them at the current and ordinary price for sound, wholesome pork chops, and with due care took them to her house and cooked them; that she and the plaintiff Percy ate of the chops so bought and prepared, and thereby were made sick because of the unwholesome, unsound, poisonous, or unfit quality or condition of the pork chops, and suffered severely in body and mind, and that each plaintiff because of such illness was deprived of the society of the other.

In the first action, it also was found that "there was no negligence shown on the part of the defendants unless the foregoing evidence and findings constitute negligence as matter of law."

In the first action, the trial judge found for the defendant; and also found that, if the plaintiff were entitled to recover, her damages would be \$60 "on the first or third count" and \$15 on the second count.

In the second action the trial judge found for the plaintiff in the sum of \$175 on the first count, and \$25 on the second count, of which \$10 was for expense and \$15 for loss of services and society.

The trial judge reported both cases to the Appellate Division, the first at the request of the plaintiff, and the second at the request of the defendants. The Appellate Division in the first case ordered judgment for the plaintiff in the sum of \$60 upon the first count of her declaration, and in the second case ordered judgment for the plaintiff in the sum of \$175 upon the first count of his declaration, and \$10 upon the second count. The defendants appealed.

H. Bergson, for the defendants.

E. C. Upton, for the plaintiffs.

DE COURCY, J. The sales act, St. 1908, c. 237, § 15, provides: "Subject to the provisions of this act and of any other statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

"(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

Even before the enactment of this statute, it was recognized as the law in this Commonwealth, that where the buyer at a shop relies on the skill and judgment of the dealer in selecting food, and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, he is liable if it is not fit to be eaten; while, in case the buyer himself selects provisions, the dealer's implied warranty does not go beyond the implied assertion that he believes the food to be sound. *Farrell v. Manhattan Market Co.* 198 Mass. 271.

The application of this rule of law to the facts as found by the trial judge is decisive in the action of Percy A. Gearing. His wife, acting as his agent, left to the defendants the selection of the meat, and paid for it at the current price for sound, wholesome pork chops. See *Hunt v. Rhodes Brothers Co.* 207 Mass. 30. The defendant Freshman undertook to make the selection so left to him. The meat was cooked, and was eaten by the plaintiff and his wife, and

both were made sick "because of the unwholesome, unsound, poisonous, or unfit quality or condition of said pork chops." The order of the Appellate Division in this action must be affirmed.

In the action of the wife, Katherine Gearing, the Appellate Division ordered judgment for the plaintiff on the first count of her declaration, and from this the defendants appealed. The count is apparently framed in contract, for breach of an implied warranty or condition of fitness for food. The declaration purports to be "in tort," presumably on the theory that an action of tort may be maintained upon a false warranty. See *Farrell v. Manhattan Market Co.* 198 Mass. 271, 274, and cases cited. The difficulty with the case on this ground is that there was no contractual relation, and hence no warranty, between Mrs. Gearing and the defendants. The only sale was that made to her husband through her as his agent; and a cause of action in contract accrued to him thereon, as above set forth. The implied warranty, or to speak more accurately the implied condition of the contract, to supply an article fit for the purpose required, is in the nature of a contract of personal indemnity with the original purchaser. It does not "run with the goods." Williston on Sales, § 244. *Lebourdais v. Vitriified Wheel Co.* 194 Mass. 341. *Roberts v. Anheuser Busch Brewing Association*, 211 Mass. 449, 451.

It may be added that Mrs. Gearing's right to recover on her second count, added by amendment, which is in tort for negligence is concluded by the findings of fact against her. The sale apparently was one of "adulterated food" under R. L. c. 75, §§ 16, 18, 24; and the violation of the statute by the defendants presumably was some evidence of negligence. *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 496. But that is controlled by the finding of the judge, that no negligence in fact was shown on the part of the defendants. In the absence both of an implied warranty and of negligence on the part of the defendants, the action of Mrs. Gearing fails. *Roberts v. Anheuser Busch Brewing Association*, *ubi supra*. *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177. *Gately v. Taylor*, 211 Mass. 60. *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265.

Consequential damages for loss of consortium cannot be recovered in either case. *Feneff v. New York Central & Hudson River Railroad*, 203 Mass. 278. *Bolger v. Boston Elevated Rail-*

way, 205 Mass. 420. *Whitcomb v. New York, New Haven, & Hartford Railroad*, 215 Mass. 440, 442. See 16 Columbia Law Review, 122.

In the case of Percy A. Gearing the order of judgment for the plaintiff must be affirmed; and in the case of Katherine Gearing the order of the Appellate Division must be reversed, and judgment entered for the defendants.

So ordered.

ABRAHAM DEUTSCHMAN vs. WILLIAM F. DWYER & others.

Suffolk. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Partnership. Equity Jurisdiction. For an accounting between partners.

In a suit in equity for an accounting in accordance with an oral agreement between the plaintiff and the defendant for carrying on as equal copartners a cigar, tobacco and confectionery business for which the defendant was to procure from a city a lease or concession in a refectory building in a park, where the defendant had procured from the city such a lease or concession in his own name and contended that on the termination of the partnership he was entitled to it for his own benefit, but the trial judge found that the lease was procured for the use and benefit of the partnership to be held by the defendant as partnership property, it was *held*, that the plaintiff upon an accounting was entitled to share in the net value of the lease at the time of the termination of the partnership in excess of the rent reserved.

BILL IN EQUITY, filed in the Superior Court on October 8, 1914, for an accounting by the defendant Dwyer as a copartner of the plaintiff in the business of selling and dealing in cigars, tobacco and confectionery at the refectory building in Franklin Park in Boston.

In the Superior Court the case was heard by *Jenney, J.*, who made the following findings of fact and an order for an interlocutory decree.

"The plaintiff and William F. Dwyer, hereinafter called the defendant,* agreed to enter into a partnership for carrying on the

* Originally the Edison Electric Illuminating Company of Boston and the Cosmopolitan Trust Company also were made defendants, but the bill was dismissed as to these defendants before the final decree.

refectory at Franklin Park. As a part of that agreement it was understood, and in fact expressly agreed, that the plaintiff should furnish the necessary capital for the business and that the defendant was to procure a concession, from the city of Boston, of the premises to be occupied. It was further agreed that the defendant was not to give his personal time to the business unless he so desired. The interest of the partners was to be equal so far as a division of the profits.

"I find that, pursuant to this agreement, the defendant did procure, from the city of Boston, the concession referred to, for the benefit of the business, and to be held by him for its use and benefit and as partnership property, and not as his individual property, and that the parties pursuant to the agreement entered upon its performance and procured personal property, including furniture, fixtures and merchandise to be used therein and as partnership property, and opened the business, believing and understanding that the business was to be carried on by them as partners and that the plaintiff was thereafter to perform his part of the agreement by the furnishing of sufficient capital for the business.

"I further find that the plaintiff did furnish some capital for the business, but do not deem it within the purview of the present hearing to determine how much capital he did furnish, or to determine how much he agreed to furnish or how much was reasonably required.

"I find as a fact that he did not furnish all the capital reasonably required for the business, and that the defendant was obliged to furnish capital himself, and did so furnish it. Notwithstanding the fact that the plaintiff did not comply with all the terms of the agreement, the defendant did not for that reason attempt to rescind the agreement or to cease transacting the business that had been commenced under the understanding and agreement hereinbefore referred to.

"I further find that the business was so carried on until early in the month of October last [1914].

"This finding is not intended to state the amounts of capital contributed by either partner, the value of services rendered, the amount that each partner was entitled to withdraw from the business, or any fact other than those specifically herein set forth.

"The case is to be referred to a master to determine the questions hereinbefore referred to as not covered by this finding; to determine any other questions necessary for final decision of the case, and for the purpose of an account."

The master, who was appointed under the interlocutory decree thus ordered, made the findings that are stated in the opinion.

The defendant's exceptions to the master's report, which are referred to in the opinion, were as follows:

"1. The defendant excepts to the master's ruling that the lease from the city of Boston to the defendant Dwyer was not his individual property and was not in the nature of a contribution to capital to revert to him on dissolution.

"2. The defendant Dwyer excepts to the master's ruling that the finding of the court . . . [described below] is final and conclusive as to the plaintiff's right to require the defendant Dwyer to account for the value of the lease after the date of dissolution.

"3. The defendant excepts to the master's ruling that the lease from the city of Boston to the defendant Dwyer is a proper element to be taken into consideration as one of the assets of the partnership on October 5, 1914.

"4. The defendant excepts to the master's ruling that the lease from the city of Boston to the defendant Dwyer is a proper element to be taken into consideration in determining the amount for which the plaintiff is entitled to an accounting."

The finding in the master's report referred to in the second exception quoted above was as follows:

"The defendant contends that this lease was his individual property, donated by him to the use of the partnership, so long as the firm existed, and was in the nature of a contribution to capital which reverted to him on the dissolution of the partnership. I rule to the contrary. The court has found in its memorandum of facts 'That pursuant to said agreement the defendant did procure, from the city of Boston, the concession referred to, for the benefit of said business, and to be held by him for its use and benefit and as partnership property and not as his individual property.' This finding is final and conclusive so far as the master is concerned."

The master found that, after making an allowance of \$375 for the time from July 3 to October 5, the lease had a net value, over

and above the rent reserved, of \$4,125, and that this should be added as an asset existing on October 5, 1914.

By order of *Wait*, J., a final decree was entered overruling the defendant's exceptions and ordering the defendant to pay to the plaintiff the sum of \$2,761 with interest from October 5, 1914, and costs. The defendant appealed.

F. W. Johnson, for the defendant Dwyer.

F. P. Garland, (*J. Isaacs* with him,) for the plaintiff.

BRALEY, J. The admissions in the answer coupled with the evidence amply sustain the finding of the presiding judge that the parties entered into a parol agreement which constituted a partnership as alleged in the bill. *McMurtrie v. Guiler*, 183 Mass. 451.

It is plain from its terms that, unless the refectory building in Franklin Park where the business of the firm was to be carried on could be leased, the partnership had no reason for its existence. The very life of the enterprise was understood by each partner as dependent upon the procurement from the owner, the city of Boston, of a concession or lease. And the further finding, that the defendant through prudent negotiations obtained the lease for "the benefit of said business" and in accordance with the partnership agreement, being well supported by the evidence should stand. While it is true that the partnership was at will and that the lease taken in the defendant's own name is for a fixed term, the leasehold nevertheless was held by him not as his individual property but in trust for the benefit of himself and of the plaintiff. *Lurie v. Pinanski*, 215 Mass. 229, 231. *Holmes v. Darling*, 213 Mass. 303. See also *Arnold v. Maxwell*, *ante*, 47. To adopt the defendant's contention of sole ownership would be to violate the fiduciary character of the partnership relation. We find no revisible error at the trial of the merits or in the interlocutory decree referring the case to a master to state the account, although the decree should have contained a clause decreeing a dissolution of the firm.

The leasehold being an asset of the partnership, the plaintiff was entitled to participation in its value in excess of the rent reserved as found by the master, and the defendant's first, third and fourth exceptions are disposed of by what has been said. *Freeman v. Freeman*, 136 Mass. 260, 263.

The second exception, that the master incorrectly ruled that the findings of fact by the court "are final and conclusive" as to the plaintiff's right to require the defendant to account for the value of the lease after the date of dissolution, requires no comment, except that it has not been overlooked. *Eastern Bridge & Structural Co. v. Worcester Auditorium Co.* 216 Mass. 426, 429.

The decree should be so modified as to include an order for dissolution, and when modified it is affirmed with costs. *Wiggins v. Brand*, 202 Mass. 141, 147.

Ordered accordingly.

JOSEPH F. KESSELER vs. FREDERICK C. BOWDITCH.

Suffolk. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Easement, Extent of. Light and Air.

A deed of a lot of land, which when conveyed was twenty feet wide on a city street and twenty-nine feet deep, granted "the privilege of putting two or three windows on the north side of each dwelling house which may be built on said premises." A dwelling house was built on the lot having three windows in the rear north wall overlooking land that belonged to the grantor when the deed was made. This dwelling house, the windows in its rear north wall and the open land adjoining all remained in the same condition for more than eighty years. None of the three windows was in the first story of the building, all being in the upper stories. The owner of the adjoining open land proposed to construct upon it a building only one story in height, which would not interfere with the light and air coming to the existing windows. The owner of the dwelling house brought a suit in equity to enjoin the construction of such building. *Held*, that the words "each dwelling house which may be built on said premises" did not limit the easement of light and air to the dwelling house first built, and that such easement would be likewise appurtenant to any dwelling house built on the land thereafter: but that, as to the existing dwelling house, the rights of the parties had become fixed by the placing of the three windows in the north wall above the first story and the acquiescence in their presence there for so long a period of time, and the bill seeking to restrain the erection of a one story building under the present conditions was dismissed; it being *said*, that it was not necessary to determine at this time, whether, in case of the removal or destruction of the present building and the erection of a new dwelling house on the land, windows placed in the north wall must be in the same positions as the present ones or whether they might be placed elsewhere.

BILL IN EQUITY, filed in the Superior Court on December 8, 1915, by the owner of certain land with a dwelling house thereon at the northwest corner of Pleasant Street and Piedmont Street in Boston, alleging that adjacent to the rear of the plaintiff's premises and on the defendant's land there was a certain open courtyard or passageway leading from the defendant's premises to Pleasant Street known as Newman Court which had been in existence as a court kept open for light and air and as a passageway for over sixty years; that the plaintiff had a right or easement to light and air over the court or passageway; that the defendant had made plans and was about to build upon the passageway greatly to the damage of the plaintiff and to his rights therein; and that the plaintiff had no adequate remedy at law; praying that the defendant might be enjoined from building on or over such passageway and that the plaintiff's right in such passageway might be established.

The answer alleged that "If the plaintiff or any other person has any right or easement to light and air over any part of his (the defendant's) premises, such right or easement is limited to the right to maintain a specific number of windows, and that this right has long since been defined and limited by the placing of certain windows in full exercise of the right, which windows are above the roof of any building which the defendant contemplates erecting as above mentioned and will not be interfered with thereby."

In the Superior Court the case was submitted upon an agreed statement of facts, including the facts stated in the opinion, to *Morton, J.*, who made the following decree:

"This case came on to be heard at this term upon an agreed statement of facts and certain photographs and was argued by counsel and it appearing to the court that this plaintiff now has a dwelling house upon the premises in question which is used as a dwelling house and that this plaintiff has the privilege under the deed from Neunan to Pratt, a copy of which is annexed to the agreed statements of facts, of putting two or three windows in any part of the north side of said dwelling house that he may desire or of any other dwelling house which may be built on said premises provided the same be blinded with reversed blinds; and it appearing that the defendant's proposed building will be an infringement of said right and that the plaintiff is entitled to have

a reasonable space left vacant in the rear of his property for the purpose of light and air for any window that may be placed in the first story of his premises or any other portion thereof; it is therefore ordered, adjudged and decreed that the defendant, his agents, attorneys, heirs and assignees and all persons claiming by or under him be and hereby are enjoined from building upon or over said place known as Newman Place in the rear of the plaintiff's said lot, so long as the plaintiff shall maintain a dwelling house thereon, the defendant to have leave to apply to modify the terms of this injunction in case of a change in the circumstances of the parties before final decision by the Supreme Judicial Court."

The defendant appealed.

R. Homans, for the defendant.

A. W. Blakemore, for the plaintiff.

CROSBY, J. The plaintiff is the owner of a parcel of land at the corner of Pleasant and Piedmont streets in Boston. The rear of the lot abuts upon a passageway called Newman Place. The land in the rear of the plaintiff's lot, including the passageway, is owned by the defendant. The plaintiff derives title to his land under a deed from James Neunan to Joseph Pratt and Andrew McKenney, dated October 8, 1825. This deed, like other deeds given by Neunan to other persons about the same time, contains the following provision: "Also the privilege of putting two or three windows in the north side of each dwelling house which may be built on said premises, provided the same be blinded with reversed blinds." This clause created an easement of light and air. The present building on the lot conveyed by Neunan to Pratt and McKenney is a brick dwelling house and was built before the year 1835. There are three windows in the rear north wall overlooking the premises of the defendant. None of these windows is in the first story of the building, but all are in the upper stories.

The taking by the city of a portion of the original lot for the purpose of widening Piedmont Street did not affect the building thereon or extinguish the easement. *Canny v. Andrews*, 123 Mass. 155. The provision that the windows "be blinded with reversed blinds" undoubtedly was for the purpose of preventing the blinds to be placed upon the windows from extending over or encroaching upon the passageway. An inspection of the photo-

graph in evidence shows that this condition has been complied with, and the presiding judge was justified in so finding.

It is stated in the agreed facts that "The defendant proposes to build a one story building in the rear and to the north of the premises conveyed by Neunan to Pratt over a part of Newman Place. The defendant does not intend to build in any way so as to block the windows now existing in the rear of the premises, now belonging to the plaintiff and forming a part of the premises conveyed by Neunan to Pratt."

The first question is, What is meant by the words "each dwelling house which may be built on said premises?" We are of opinion that as to the plaintiff's lot, which originally was about twenty feet wide and about twenty-nine feet deep, these words, properly construed, mean each successive dwelling house that shall be so built, and that the language used is not to be construed to refer to the total number of dwelling houses which may be built upon the lot. It follows that the easement is not limited to the dwelling house first built, but applies as well to other dwelling houses in point of time afterwards erected. The language of the deed considered in *American Unitarian Association v. Minot*, 185 Mass. 589, cited by the defendant, is plainly distinguishable from that under consideration in the case at bar.

The question remains whether the rights of the parties have become fixed by the placing of the three windows in the north wall of the building above the first story. The present dwelling house, as above stated, was built before the year 1835, and, so far as appears, the windows in the north wall have been maintained in the same place ever since the building was erected, a period of more than eighty years.

It is well settled that when an easement is created by deed, but its precise limits and location are not defined, the location and use of the easement by the owner of the dominant estate for many years, acquiesced in by the owner of the servient estate, will be deemed to be that which was intended to be conveyed by the deed. *Jennison v. Walker*, 11 Gray, 423, 426. *Bannon v. Angier*, 2 Allen, 128. *Dyer v. Sanford*, 9 Met. 395, 402.

As was said by this court in *Cotting v. Murray*, 209 Mass. 133, at page 139, "We think that the case comes within the principle that where an indefinite way has been granted and is either at the

time or afterwards by the common consent of the grantor and grantee practically located and determined, and as thus located is used and acquiesced in by all parties interested for a long term of years, it will be regarded as the way intended to be granted by the deed."

It is true that the easement of light and air created by the deed under which the plaintiff claims is of a different character than an easement of a right of way, but we see no reason why the same principle should not apply. As the deed given by Neunan did not specify in what places in the north wall the windows might be located, the grantees and those claiming under them could at the outset place such windows wherever they saw fit, acting reasonably. No windows have ever been maintained in the first story so far as appears, but have for more than eighty years been located in the upper stories. The fact that the owners of the servient estate have allowed the windows to remain as originally located, thereby permitting rays of light to extend over the passageway into the windows as so located during this long period of time apparently without objection, is persuasive evidence of acquiescence by the owners of the servient estate in the manner in which the owner's rights under the easement have been exercised. We think, under these circumstances, that the rights of the parties have become settled and established so far as the present dwelling house is concerned, and that the owner cannot change the location of any of the windows, his right to light and air being limited to the windows as they now exist. *City National Bank of Salem v. Van Meter*, 14 Dick. 32. *Johnson v. Hahne*, 16 Dick. 438. *Scott v. Pape*, 31 Ch. D. 554. *Bullers v. Dickinson*, 29 Ch. D. 155. *Tapling v. Jones*, 11 H. L. Cas. 290, 307.

The plaintiff contends that, as the easement was created by express grant, it cannot be lost by abandonment, and therefore that he has not lost the right to open a window in the wall in the lower story, and that he may close one of the present windows and open another in the first story. The doctrine that an easement created by deed is not extinguished by mere non-user is well established. *Parsons v. New York, New Haven, & Hartford Railroad*, 216 Mass. 269, 272. *Willets v. Langhaar*, 212 Mass. 573, 575. The question of abandonment does not arise in the case at bar.

Undoubtedly the plaintiff is entitled to the benefit of the ease-

ment as appurtenant to his estate. The right which originally existed to place a window upon the lower story has not, strictly speaking, been abandoned, but the plaintiff or his predecessors in title have fixed the location of the easement elsewhere, and it cannot now be changed.

It is not necessary at this time to determine the question whether, in case of the removal or destruction of the present building and the erection of a new dwelling house, windows placed in the north wall must be in the same location as in the present building or may be put elsewhere.

Decree reversed; bill dismissed with costs.

THOMAS W. DEVNEY'S (dependent's) CASE.

Suffolk. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act. Municipal Corporations, Fire department. Boston Fire Department. Words, "Laborers," "Workmen," "Mechanics."

A hoseman stationed at an engine house in the city of Boston, who is a member of the fire department of that city, is not a laborer, a workman or a mechanic within the meaning of St. 1913, c. 807, § 1, which provides that a city accepting that statute shall pay compensation in the manner provided in the workmen's compensation act "to such laborers, workmen and mechanics employed by it as receive injuries arising out of and in the course of their employment, or, in case of death resulting from any such injury."

BRALEY, J. By the St. of 1913, c. 807, § 1, cities and towns upon acceptance of the act may pay compensation "to such laborers, workmen and mechanics" employed by them "as receive injuries arising out of and in the course of their employment, or, in case of death resulting from any such injury, may pay compensation . . . to the persons thereto entitled" as provided in the St. of 1911, c. 751, and acts in amendment thereof. It appears from the record that the city of Boston accepted the statute, and the question is whether the deceased employee upon whom the claimant, his mother, was partially dependent, was a laborer, workman or mechanic within the meaning of the statute.

At the time of his injury and death he was a hoseman and a member of a fire company stationed at one of the engine houses of the city where he was housed when on duty, performing the services required by his position. The Legislature by St. 1880, c. 107, as amended by Sts. 1881, c. 22; 1909, c. 308; 1911, c. 134; and 1913, c. 168, created a corporation known as the "Boston Firemen's Relief Fund" to hold moneys and real and personal estate not to exceed a certain amount for the benefit of members of the Boston fire department or their families requiring assistance. *Fickett v. Boston Firemen's Relief Fund*, 220 Mass. 319. And under the rules and regulations provided by the municipal ordinances the departmental force is classified in three divisions. The permanent or "fire force" to which the decedent belonged are organized in companies the members of which are required to wear uniforms, and are subject to penalties imposed by the fire commissioners for infraction of the rules and discipline of the department. It also is shown that the civil service rules as established by the commission under R. L. c. 19, §§ 7, 11, classified a hoseman employed by the city as in the "Official service" and not in the "Labor service," which is divided into "Laborers," "Skilled laborers," "Mechanics and Craftsmen." To ascertain its true construction the statute under consideration may be read in connection with these statutes, and Sts. 1910, c. 196; 1912, c. 453, enacted in favor of firemen in other cities, and the R. L. c. 32, relating to fire departments, fire districts and firemen's relief funds, as amended by Sts. 1902, c. 108, § 1; 1906, cc. 171, 476; and 1911, c. 321. The Legislature at the date of enactment must be presumed to have known that, under previous and unrepealed legislation, the city in common with other municipalities had an established fire department with a fixed and permanent tenure of service for its members who had been expressly recognized as being in a class by themselves, and that this court in *Fisher v. Boston*, 104 Mass. 87, had held them to be public officers, for whose negligence when acting in the discharge of their duties the city is not responsible. *Shelton v. Sears*, 187 Mass. 455. *Wood v. Woodburn*, 220 Mass. 416. If when extending the compensation act it also was the purpose to include all persons of whatever rank serving in the various municipal departments, plain and unambiguous terms should have been used showing the change and enlarge-

ment. A "laborer" ordinarily is a person without particular training who is employed at manual labor under a contract terminable at will, while "workmen" and "mechanics" broadly embrace those who are skilled users of tools. *Oliver v. Macon Hardware Co.* 98 Ga. 249. *Ellis v. United States*, 206 U. S. 246. *Breakwater Co. v. United States*, 183 Fed. Rep. 112, 114. Compare *State v. Ottawa*, 84 Kans. 100. And the framers of the statute undoubtedly intended that the words "laborers, workmen and mechanics" should be taken in their ordinary lexical sense which excludes the trained and disciplined force comprising the defendant's fire department.

The provision of § 5 of the statute, that "Any person entitled to receive from the Commonwealth or from a county, city, town or district the compensation provided . . ., who is also entitled to a pension by reason of the same injury, shall elect whether he will receive such compensation or such pension, and shall not receive both," has not been forgotten. But this section is to be read with § 7, which expressly says that the provisions of St. 1911, c. 751, and acts in amendment thereof "shall not apply to any persons other than laborers, workmen and mechanics employed by counties, cities, towns or districts having the power of taxation."

We are accordingly of opinion that the ruling asked for by the city, that the decedent was not a workman, laborer or mechanic at the time of his injury and death, should have been made. The decree * must be reversed, and a decree is to be entered in favor of the employer.

So ordered.

W. J. O'Malley, for the city of Boston.

J. M. Graham, for the dependent.

* Made in the Superior Court by *Morton, J.*, affirming a decision of the Industrial Accident Board.

EUGENE BRANCONNIER'S CASE.

Suffolk. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Workmen's Compensation Act. Proximate Cause.

If a workman employed by a subscriber under the workmen's compensation act, who had lost one eye before he entered such employ, is totally incapacitated for work by the loss of his remaining eye from an injury arising out of and in the course of his employment, he is entitled to compensation under the act, although his total incapacity is in part the result of the previous accident by which he lost the first eye.

RUGG, C. J. The employee, a man who in 1910 had lost one eye, met with an injury in 1915 arising out of and in the course of his employment for a subscriber under the workmen's compensation act, whereby he lost the sight of his remaining eye. The question presented is whether there was error in refusing to rule as matter of law that the total incapacity of the employee could not be attributed to the injury of 1915, because made up in part of the result of a previous accident.

The denial of this request was right. The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless, it was the employee's capacity. It enabled him to earn the wages which he received. He became an "employee" under the act and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time "While the incapacity for work resulting from the injury is total." St. 1911, c. 751, Part II, § 9. It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication that the Legislature intended any such division. The total capacity of this employee was not so great as it would have

been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury. In principle this case is concluded by the reasoning and the decision of *Madden's Case*, 222 Mass. 487, where the subject of pre-existing infirmities of the employee, as bearing upon the right and extent of compensation under the act, was discussed at large. *Brightman's Case*, 220 Mass. 17.

This conclusion is in harmony with *Ball v. William Hunt & Sons, Ltd.* [1912] A. C. 496, *Lee v. William Baird & Co. Ltd.* 45 Sc. L. R. 717, and *Schwab v. Emporium Forestry Co.* 167 App. Div. (N. Y.) 614. The statute under consideration in *Weaver v. Maxwell Motor Co.* 186 Mich. 588, appears to have been so different as perhaps not to make that decision inconsistent with our view. But if, and so far as it is inconsistent, we are constrained not to follow it.

*Decree * affirmed.*

L. C. Doyle, for the insurer.

A. L. Eno, for the employee.

NATHAN FINGOLD vs. MORRIS SCHACTER.

Suffolk. January 14, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Bankruptcy. Judgment, Special.

In an action of contract, the defendant in which filed a petition in bankruptcy while the action was pending and obtained a discharge, but, although a suggestion of bankruptcy was filed, the defendant filed no answer setting up his discharge in bankruptcy as a bar to the plaintiff's claim, it was assumed in the record before this court and in the briefs of the counsel on both sides that the discharge had the same effect that it would have had if duly pleaded, and the case was so treated by this court.

In the case mentioned above there was no existing attachment or equitable lien,

* Made in the Superior Court by *Morton, J.*, affirming a decision of the Industrial Accident Board.

no bond had been given to dissolve the attachment and no money had been paid into court. The trial judge ruled that the discharge in bankruptcy barred the action and that no special judgment could be entered under R. L. c. 177, §§ 24, 25. *Held*, that the ruling was right.

In an action at law a deposit of money by the defendant's attorney with the plaintiff's attorney acknowledged to have been received "in lieu of attachment bond" cannot be made the foundation of a special judgment under R. L. c. 177, §§ 24, 25, being a form of security not recognized by that statute.

CONTRACT OR TORT for the loss of certain suits of clothes entrusted by the plaintiff to the defendant to be cleaned. Writ in the Municipal Court of the City of Boston, dated September 8, 1913.

At the trial in the Municipal Court of the City of Boston it appeared that the suits of clothes were destroyed on July 26, 1913, by a fire which burned the defendant's premises and which was caused by an explosion of naphtha, that on July 10, 1914, the defendant filed a petition in bankruptcy, and included the plaintiff's name and claim in the schedule of his creditors. On November 19, 1914, a suggestion of bankruptcy was filed.

When the action was begun on September 8, 1913, property of the defendant was attached, and on September 12, 1913, the attorney for the defendant gave to the attorney for the plaintiff \$125 and received from the attorney for the plaintiff the following acknowledgment and agreement in writing :

"September 12, 1913.

"Received of Samuel Sigilman, One Hundred, Twenty-five Dollars (\$125.00) in lieu of attachment bond in the case of Nathan Fingold vs. Morris Schacter, writ brought in the Boston Municipal Court, dated September 8th, 1913, returnable September 27th, 1913, in which the Royal Insurance Company was named as trustee. This amount will be held by me to await the determination of the above mentioned suit. If a judgment is rendered in favor of the plaintiff, this amount or any portion thereof is to be applied in satisfaction of the same, and if judgment is for the defendant, this amount will be returned to Mr. Sigilman ; it being understood that Mr. Sigilman is to enter an appearance as attorney for the defendant.

Wm. J. Holbrook, Atty. for Fingold."

Thereupon the attachment was discharged.

The judge ruled (1) that the defendant was not liable for the loss of the goods by fire unless negligence on his part was proved; (2) that the happening of the explosion was sufficient evidence to sustain a finding that the plaintiff's property was destroyed through the negligence of the defendant, and the judge so found; (3) that the plaintiff's claim against the defendant was barred by the discharge in bankruptcy and that the plaintiff was not entitled to a judgment for his damages, which amounted to \$115, nor was he entitled to a special judgment under R. L. c. 177, §§ 24, 25. After making his findings of fact, the judge refused a request of the plaintiff to rule (4) that on all the evidence the plaintiff was entitled to recover under the second count of his declaration, which was a count in tort alleging negligence.

The judge found for the defendant; and at the request of the plaintiff reported the case to the Appellate Division. The Appellate Division made an order dismissing the report; and the plaintiff appealed.

The case was submitted on briefs.

W. J. Holbrook, for the plaintiff.

S. Sigilman, for the defendant.

BRALEY, J. The evidence having warranted the trial judge in finding that as a bailee for hire the defendant was responsible for the destruction by fire while in his possession of the suits of clothing which had been received for the purpose of being cleaned and returned, the plaintiff suffered no harm from the first ruling. It became immaterial, and the assessment of damages ordinarily would have followed. *Eastman v. Sanborn*, 3 Allen, 594. *Brewster v. Warner*, 136 Mass. 57, 59. *Lincoln v. Gay*, 164 Mass. 537. *Beattie v. Boston Elevated Railway*, 201 Mass. 3, 6.

It appears, however, that after the action had been brought the defendant was adjudged a bankrupt, and the plaintiff's claim, although suable in either contract or tort, was provable under § 63 of the bankruptcy act of 1898 as amended by the U. S. Sts. of 1903, c. 487; 1906, c. 3333; 1910, c. 412. *Dunbar v. Dunbar*, 190 U.S. 340, 349. *Crawford v. Burke*, 195 U. S. 176, 194. *Clarke v. Rogers*, 183 Fed. Rep. 518. *Reynolds v. New York Trust Co.* 188 Fed. Rep. 611. Having obtained his discharge, the effect of which is assumed in the record and in the briefs of counsel to be the same as if it had been duly pleaded, the defendant, even if the writ was dated more

than four months before the filing of the petition, is freed from all liability, unless by force of the lien which exists where an attachment has been made, or an injunction has issued, or security has been given, the plaintiff is entitled to a special judgment as provided by R. L. c. 177, §§ 24, 25. U. S. St. 1898, c. 541, § 17; § 67 c. *Herschman v. Justices of the Municipal Court of the City of Boston*, 220 Mass. 137. *Rosenthal v. Nove*, 175 Mass. 559. *Snyder v. Smith*, 185 Mass. 58, 61, 63.

But, as no attachment of property remained in force, no bond was given to dissolve an attachment and no payment of money into court is shown, the plaintiff is not entitled to a special judgment under either section, and no general judgment can be entered because of the discharge. The agreement that the money deposited by the defendant with the plaintiff's attorney "in lieu of attachment bond" should be held to await the termination of the action, and then if the plaintiff recovered applied in satisfaction of the judgment, is not within the provisions of our statute and is unenforceable. The third ruling, that the discharge in bankruptcy barred the action and that no special judgment could be entered, and the refusal of the plaintiff's fourth request, were right.

The order dismissing the report should be affirmed.

So ordered.

JAMES A. THOMPSON vs. CHARLES L. KNAPP.

Middlesex. January 17, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Trust, Trustee's accounting for income. *Equity Jurisdiction*, For an accounting. *Interest*.

Where the lessee under a ten year lease deposited with a third person as trustee the sum of \$3,000 as security for the payment of the rent under the lease, and such third person deposited the \$3,000 in a trust company in his own name as trustee, and where there was credited to the account interest at the rate of two and one half per cent per annum compounded monthly, and at the end of the ten years when the lease expired such third person returned to the lessee the \$3,000 without the interest, and the lessee brought against him a suit in equity for an accounting, it was *held*, that the defendant, who had held the fund de-

posited with him upon an express trust and had invested it, was bound to account to the plaintiff for the interest earned.

In the case above stated it was *said* that, inasmuch as the defendant had invested the fund, it was not necessary to consider whether he would have been liable for a failure to invest it.

In the case above stated it was assumed from the record that a claim of the trustee for compensation either was disallowed or had been waived.

BILL IN EQUITY, filed in the Superior Court on August 8, 1912, praying for an accounting for the alleged trust fund described in the opinion.

The case was heard by *Hamilton, J.*, who found the facts that are stated in the opinion and ordered that a decree be entered directing the defendant to pay to the plaintiff a sum of money equal to the interest allowed to the defendant by the Middlesex Safe Deposit and Trust Company upon the deposit by the defendant of \$3,000, which had been placed in his hands to secure the payment by the plaintiff of the rent under a ten year lease to him from the Wamesit Power Company, a corporation, as stated in the opinion.

From the decree entered in pursuance of this order the defendant appealed.

L. T. Trull & J. M. O'Donoghue, for the defendant.

M. G. Rogers, for the plaintiff.

DE COURCY, J. As security for the execution by him of a ten year lease from the Wamesit Power Company, and for the monthly payment of the rent, the plaintiff on June 6, 1898, deposited \$3,000 with the defendant, as trustee; and the defendant in writing accepted the express trust.

The defendant deposited the money in a trust company in his own name as trustee. On June 20, 1908, when he paid to the plaintiff the sum of \$2,000 from the fund, interest at the rate of two and one half per cent per annum compounded monthly had been credited to the account in the sum of \$826.84. When the further sum of \$1,000 was paid to the plaintiff, there was an additional credit on the bank account of \$27.52 interest.

On these facts, found by the trial judge and not disputed, we have no occasion to consider whether the defendant would have been liable for a failure to invest the fund. He did invest it, and it has produced interest. And he held it, not as a mere bailee or stakeholder for a short period, but as an express trustee, and for

the ten years of the lease or longer. His legal liability was that of a trustee. *Maverick Congregational Society v. Lovejoy*, 6 Allen, 183. *Maxwell v. Whieldon*, 10 Cush. 221. The interest accruing to the fund was not his to dispose of, and must be accounted for to the plaintiff as owner. *Davis v. National Life Ins. Co.* 188 Mass. 299. *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, 203. 39 Cyc. 422, and cases cited.

The memorandum of the trial judge does not make it clear whether the defendant's claim for compensation, set up in his amended answer, was passed upon. But as he does not argue this question in his brief and it does not seem to have been pressed at the trial, we assume that the claim either was disallowed or has been waived.

Decree affirmed.

EMELINE S. RICE vs. FREDERIC D. MERRILL & others.
MARY C. HEALY, intervening petitioner.

Middlesex. January 18, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Trust, Construction. Limitations, Statute of. Equity Jurisdiction, Laches. Equity Pleading and Practice, Intervening petition.

By an interlocutory decree in equity it was ordered that certain specified property should be transferred to a trustee named, "in trust, to pay all present just debts, charges and expenses, of said E. R.," including what might be found to be due to the trustee, to provide for the support of E. R. and to dispose of the balance of the estate remaining at her death. A petition to intervene in the suit was filed seven years and a half after the decree was made by an alleged creditor of E. R., setting forth a claim for services performed for her about nine years before the filing of such petition, and alleging that the trustee at all times had known of the petitioner's claim. Upon demurrer it was *held*, that on the allegations of the petition the petitioner had a beneficial interest in the property held by the trustee, which was charged with the payment of the debt due to the petitioner, and therefore that the statute of limitations would not begin to run in favor of the trustee unless and until the trust was repudiated by him.

In the same case it was *held*, that the petition disclosed no laches that would bar the petitioner's claim, as it did not appear that any one other than the petitioner had been harmed by his delay in filing his petition.

Where in an intervening petition in a suit in equity setting forth a claim, against a

fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [the petitioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30.

DE COURCY, J. This suit originally was brought by Emeline S. Rice, a widow then eighty-four years of age, to set aside a deed signed by her and to obtain a reconveyance of certain property, the bill containing also a prayer for general relief. On October 29, 1906, an interlocutory decree was entered, ordering the defendant to convey the property to Edwin M. Brooks, trustee. Mrs. Rice died on June 24, 1909. In 1913 the suit was before this court on certain issues, involving, among other things, the validity of the decree creating the trust and the question whether the duties of the trustee ended on the death of Mrs. Rice. *Rice v. Merrill*, 215 Mass. 419.

It was provided in paragraph two of the decree, that all the property specified should be conveyed and transferred to Edwin M. Brooks, trustee, "in trust, to pay all present just debts, charges and expenses, of said Emeline Rice," including what might be found due to the defendant; and provision was made therein for the support of Mrs. Rice and the disposition of the balance of the estate remaining at her death. In April, 1914, Mary C. Healy filed a petition to intervene in the suit as "a party interested in the subject matter of this suit and entitled to the performance of said trust by said Brooks," to which the trustee and others filed identical demurrers. The Superior Court entered a decree * sustaining the demurrers and denying the petition; and the petitioner appealed therefrom.

The first ground of the demurrers is the statute of limitations. It appears from the petition that the last work done by Mary C. Healy for Mrs. Rice was on April 7, 1905, almost nine years before she filed her petition. The dates of the payments made by Mrs. Rice on account are not specified, nor is her alleged written request that the petitioner be paid for her services incorporated in the petition. It follows that the petitioner's claim, as alleged, is barred by the statute, unless she is entitled to participate under

* By order of *Morton, J.*

the said decree of October 29, 1906, as a beneficiary. Her interest in the trust is challenged by the fourth clause set up in the demurrers.

By the express terms of the decree, already quoted, the trustee held the property "in trust, to pay all present just debts" of Mrs. Rice. On the allegations of the petition, assumed to be true for the purposes of the demurrer, such a debt then was due to Mary C. Healy. Accordingly, she had a beneficial interest in the property, which was charged with the payment of the debt due to her. If, in accordance with the prayer in the bill, the property had been reconveyed to Mrs. Rice, she could not have settled it in trust to pay the income to herself while exempting the property from liability for her existing debts. *Pacific National Bank v. Windram*, 133 Mass. 175. When the parties interested decided to have the defendant convey the property to the trustee directly, the decree of the court properly made provision for the claims of creditors, including the petitioner. Mary C. Healy acquired thereby a right to maintain a suit to have the trust enforced, so far as it affects her interests. *Noyes v. West*, 3 Cush. 423. Her written assent was not required by the terms of the decree. She alleges that the trustee at all times has known of her claim. Under the facts the statute of limitations would not begin to run in favor of the trustee unless and until the trust is repudiated by him. *Schmidt v. Schmidt*, 216 Mass. 572 and cases cited. While, as stated in the former opinion, the trustee has the duty of applying the balance of the trust funds in his hands toward only the expenses therein defined, it is plain that the duty of satisfying the "just debts" referred to in the decree rests on him, and not on the executrices of the will.

It cannot be said that the petition discloses such laches as to bar the petitioner. Nor does any one, except her, appear to have been harmed by the delay. *Coram v. Davis*, 209 Mass. 229, 250. *Garden Cemetery Corp. v. Baker*, 218 Mass. 339.

In view of the allegations of the fifth paragraph, that "an attorney . . . without her knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of thirty dollars (\$30), no part of which she has ever accepted or received," an offer to return the \$30 was not essential.

This disposes of all the grounds set up in the demurrers. The decree of the Superior Court must be reversed, and a decree entered overruling the demurrers.

Ordered accordingly.

B. J. Killion, (C. Toye with him,) for the intervening petitioner.

E. M. Brooks, for the defendants.

WILLIAM D. WINSOR & others vs. HARRIS ULIN.

Suffolk. January 18, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Covenant. Contract, Construction. Landlord and Tenant.

A lease of certain real estate was executed on June 9, 1913, for a term of twelve years beginning June 1, 1913. As of April 1, 1912, the land (apart from the buildings) was assessed for the tax year 1912-1913 at \$98,900. As of April 1, 1913, the same land was assessed for the tax year 1913-1914 at \$125,000; but when the lease was executed neither party to it knew or could have known of the change in the assessed valuation. The lease contained the following provision: "The Lessee covenants to pay to the Lessors the said rent as aforesaid and . . . further covenants that during said term in every tax year in which the valuation of the land (not including the buildings thereon) . . . as valued by the Assessors for assessment of taxes shall exceed such present valuation thereof, namely, \$98,900, he will pay to the Lessors as additional rent six (6) per cent of the amount of such excess." *Held*, that by this provision the parties to the lease agreed upon \$98,900 as the "present valuation" of the land for the purpose of ascertaining the rent to be paid, and that accordingly the lessor was entitled to additional rent equal to six per cent upon the difference between \$125,000, the amount of the increased assessment, and \$98,900, that is to say, upon \$26,100.

In the same lease it was provided that the additional rent above described should "be paid as follows: On the first day of October of the year in which such valuation shall first exceed such present valuation the Lessee shall pay to the Lessors one-half of said six (6) per cent, and thereafter on the days hereinbefore specified for the payment of rent the Lessee shall pay one-twelfth (1/12) of said six (6) per cent. On the first day of October in each year during said term there shall be an adjustment, and thereafter the monthly payments of such additional rent shall be based on the then excess, if any, in such valuation until the next adjustment. If such additional rent shall be payable hereunder in the tax year beginning April 1, 1913, or in the tax year beginning April 1, 1925, the same shall be apportioned." *It was said*, that this provision for apportionment presumably meant that, if such additional rent should be payable for the first year of the lease, the lessee should pay on October 1 only for the four months' period from the beginning of the term instead of for the half year from April 1.

DE COURCY, J. In substitution for a former lease, the parties on June 9, 1913, executed a lease of certain premises in Boston for the term of twelve years beginning June 1, 1913. One of the provisions therein was as follows:

"The Lessee covenants to pay to the Lessors the said rent as aforesaid and to pay all charges for water, and further covenants that during said term in every tax year in which the valuation of the land (not including the buildings thereon) numbered 119-133 Hanover Street as valued by the Assessors for assessment of taxes shall exceed such present valuation thereof, namely, \$98,900, he will pay to the Lessors as additional rent six (6) per cent of the amount of such excess, such additional rent to be paid as follows: On the first day of October of the year in which such valuation shall first exceed such present valuation the Lessee shall pay to the Lessors one-half of said six (6) per cent, and thereafter on the days hereinbefore specified for the payment of rent the Lessee shall pay one-twelfth ($1/12$) of said six (6) per cent. On the first day of October in each year during said term there shall be an adjustment, and thereafter the monthly payments of such additional rent shall be based on the then excess, if any, in such valuation until the next adjustment. If such additional rent shall be payable hereunder in the tax year beginning April 1, 1913, or in the tax year beginning April 1, 1925, the same shall be apportioned."

As of April 1, 1912, the land was assessed for the tax year 1912-1913 at \$98,900. As of April 1, 1913, it was assessed for the tax year 1913-1914 at \$125,000. When the lease was executed neither party knew of the change in the assessed valuation. The sole question presented is whether the defendant is liable for the additional rental, from June 1, 1913, of six per cent on \$26,100, the amount of the said increase in valuation.

It seems reasonably clear to us from the language used by the parties that they intended to agree upon \$98,900 as the "present valuation" of the land for the purpose of ascertaining the rental. Their reason for doing so is obvious. They knew this was the valuation for the preceding tax year, and it remained unchanged so far as they were aware. Ordinarily it would be some months before tax bills would be sent out and they would learn of any change made by the assessors. On the defendant's evidence,

assuming it to be competent, any increase would not be finally fixed until the tax warrant was made out and the tax rate declared, on or after the middle of August. Having agreed upon \$98,900 as the "present valuation" for the purposes of the contract, they later, in the last sentence above quoted from the lease, made provision for any change that might be made in the assessment: stipulating that, if such additional rent should be payable for that year, it would be apportioned. By that presumably was meant, that instead of one half of the increase being payable October 1, representing the six months from April 1, the lessee would pay only for the four months' period from the beginning of the term.

So construing the covenant, the words "present valuation thereof" and "namely, \$98,900," are not repugnant, calling for the rejection of the latter, as in *Birch v. Hutchings*, 144 Mass. 561. Rather the second clause is an explanatory one, specifically defining what the parties meant by the more general, and possibly ambiguous, words "present valuation," as used by them in the lease.

As there were no facts in dispute, the presiding judge * rightly directed a verdict for the plaintiffs.

Exceptions overruled.

Lee M. Friedman, (S. L. Whipple with him,) for the defendant.

B. E. Eames & R. F. Hooper, for the plaintiffs, were not called upon.

* *Stevens*, J., who ordered the jury to return a verdict for the plaintiff in the sum of \$1,300. The action was to recover the additional rent. The defendant alleged exceptions.

ESTHER G. DONLAN, executrix, vs. CITY OF BOSTON.

Suffolk. January 19, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Performance and breach. School, Teacher's salary.

A contract with a city, to perform the duties of a teacher of manual training in the public schools of the city at a fixed yearly salary, is a contract for the personal services of the teacher requiring his individual judgment and ability and is subject to the implied condition that the teacher shall be alive and able to do the work, and therefore is terminated by the teacher's death.

Where a teacher of manual training in the public schools of a city, who is employed by the year at a fixed salary payable in monthly instalments, dies during the summer vacation after the expiration of eleven months of the school year when he has performed all the service required of him for that year, nothing is due to his executor or administrator for the twelfth month, his contract of service being entire and having been terminated by his death and he having been paid in full for his services up to that time.

BRALEY, J. The plaintiff's testatrix died while in the employment of the defendant as a teacher of manual training in the public schools under a contract at a fixed yearly salary, and this action is brought to recover the balance which would have been due if she had survived the period. It is settled that as performance by her depended upon her personal judgment, ability and efforts, there was an implied condition to which the contract was subject that she should be living and physically able to do the work. *Marvel v. Phillips*, 162 Mass. 399, 401. The contract therefore was terminated by her death before the year had ended. *Browne v. Fairhall*, 213 Mass. 290, 294. *Johnson v. Walker*, 155 Mass. 253.

But as the testatrix died during the summer vacation leaving only one month of the school year unpaid for, the plaintiff contends that this amount, being one twelfth of the salary, is collectible on the basis of the payments she had received each month as shown by her signature on the pay rolls. The contract nevertheless was entire, although the payments were made by monthly instalments. *Fullam v. Wright & Colton Wire Cloth Co.* 196 Mass. 474, 476. *Clark v. Gulesian*, 197 Mass. 492. *Moffat v. Davitt*, 200

Mass. 452, 458. And full payment having been made of all that was due when her death occurred, and further payments being conditional upon the continuance of the contract and not upon whether she was excused from the rendition of services during the succeeding month, the action cannot be maintained. *Johnson v. Walker*, 155 Mass. 253, 255. Pollock on Contracts (Wald's ed.) 543, 548.

By the terms of the report * judgment is to be entered for the defendant.

So ordered.

W. J. O'Malley, for the defendant.

J. Lundy, for the plaintiff.

ALFRED E. SWEET vs. FRANK S. PECKER & others.

Suffolk. January 19, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Snow and Ice. Notice.

In an action under R. L. c. 51, §§ 20-22, as amended by St. 1908, c. 305, and St. 1913, c. 324, for personal injuries resulting from the fall of ice or snow upon the plaintiff from the roof of a building, where both the owner and the lessee of the building are made defendants, proof of a correct notice in writing addressed to and delivered to the owner, is not proof of a notice to the lessee, and, if it appears that the building was within the exclusive control of the lessee and the plaintiff discontinues his action as against the owner, he cannot maintain the action against the lessee without proof of a notice to him.

DE COURCY, J. This action was brought under R. L. c. 51, §§ 20-22, as amended by St. 1908, c. 305, and St. 1913, c. 324. A prerequisite of statutory liability is the due service of a proper notice on the person sought to be charged. *Baird v. Baptist Society*, 208 Mass. 29. *McNamara v. Boston & Maine Railroad*, 216 Mass. 506. The only notice in the case is the following:

* Made by *Hamilton, J.*

"Boston, Mass. March 23, 1914.

"To Frank S. and Annie J. Pecker,

Owners of Property numbered 27 and 29 Howard St.,
Boston, Mass.

"A claim against you for damages has been placed in my hands for adjustment, by Mr. Albert E. Sweet, for injuries received by him on February 23rd, about 7 P. M. while walking along the sidewalk of Howard Street, in front of building numbered 27 and 29, owned by you.

"The cause of said injury was the defective condition of the roof of said building, allowing an accumulation of snow and ice to fall upon him.

Yours truly,

ROBERT E. BIGNEY."

It is not disputed that this was a correct notice as to the time, place and cause of the injury, and that it was signed by a person duly authorized. But manifestly it is a notice to the owners, as the persons assumed to be legally responsible for the condition of the premises. Service of it was made by leaving a copy at the house of Annie J. Pecker, one of the owners, as the other one was living out of town. When this action was brought the plaintiff made the alleged owners two of the parties defendant. As he discontinued against them before the case went to trial on the merits, the question of their liability is not before us. See St. 1907, c. 550, § 132; *Cerchione v. Hunnewell*, 215 Mass. 588.

The plaintiff seeks to hold the remaining defendants liable as lessees, under the doctrine of *Wixon v. Bruce*, 187 Mass. 232. The record merely states that Levaggi and Niccolini had leased the premises numbered 27, 29, 29½ Howard Street, Boston, and does not disclose what covenants were in their lease. The conclusive answer to the plaintiff's claim against them, however, is that he failed to give them, as the persons sought to be charged, the notice which is a condition precedent to his right of action under the statute. The paper left by his attorney with Levaggi, one of the defendants, was a copy of the above notice to the owners, on whom he had not then served; and presumably this was done under St. 1913, c. 324, § 1, which provides that "Leaving the notice with the occupant of said premises, or, in case there is no

occupant, posting the same in a conspicuous place thereon, shall be a sufficient compliance with the foregoing provisions." He did not even know that the lease was in existence, or that the defendants were tenants. There were two distinct interests which might have been liable to the plaintiff, — the owners and the tenants. He gave the notice required by the statute, and thereby completed his right of action against only one of them, — the owners.

Under the statutes as now existing, the fact that the lease was not recorded and that the plaintiff had no knowledge of it, does not affect the right of the tenants to rely on his failure to give the prescribed written notice. See *Cerchione v. Hunnewell*, *ubi supra*. Nor is there any support in the evidence for the plaintiff's argument as to estoppel.

In accordance with the report, the verdict for the defendants * is to stand.

So ordered.

R. E. Bigney, for the plaintiff.

W. B. Luther, for the defendant.

PATRICK CROWLEY'S CASE.

Middlesex. January 19, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act. Proximate Cause.

Where in a claim under the workmen's compensation act against a city that had accepted the provisions of St. 1913, c. 807, the evidence warranted findings that the employee had "a pre-existing constitutional disease, known as syphilis," which being dormant left unimpaired his ability to perform certain arduous work for which he was employed, and that by reason of an accident arising out of and in the course of his employment his nervous system suffered a shock sufficiently severe to aggravate and accelerate the consequences of this condition until general paralysis and insanity resulted, depriving him of all capacity for work in the future, it was held, that an award rightly was made to him of com-

* Ordered by *Sanderson*, J.

pensation for total incapacity under the provisions of St. 1911, c. 751, Part II, § 9, as amended by St. 1914, c. 708, § 4.

BRALEY, J. The city contends that no causal connection between the employee's injuries and his general condition of paresis, rendering him insane and requiring his commitment to an asylum, is shown by the record, and therefore that the decree should be reversed. *McNicol's Case*, 215 Mass. 497.

But the material evidence before the arbitration committee submitted without the introduction of further testimony to the Industrial Accident Board upon review, warranted the findings, that the employee had "a pre-existing constitutional disease, known as syphilis," which, being dormant, left his ability to perform the arduous work for which he was hired unimpaired, and that, because of the nature of the accident arising out of and in the course of employment, his nervous system suffered a shock sufficiently severe to aggravate and accelerate this condition, until general paralysis or insanity resulted depriving him of all capacity for work in the future.

The statute prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or of immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited to activity through any cause originating in the performance of the work for which he is hired. What the Legislature might have said is one thing; what it has said is quite another thing; and in the application of the statute the cause of partial or total incapacity may spring from and be attributable to the injury just as much where undeveloped and dangerous physical conditions are set in motion producing such result, as where it follows directly from dislocations or dismemberments or from internal organic changes capable of being exactly located. *Madden's Case*, 222 Mass. 487.

The findings, having been justified, are conclusive, and the requests * were all properly denied. *Pigeon's Case*, 216 Mass. 51. *Sponatski's Case*, 220 Mass. 526.

* The findings requested by the city included the following, the others being of like character:

"2. Upon all the evidence the board should find that the injuries occurring
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While not disclosed by the record, we assume that the city has accepted the provisions of St. 1913, c. 807, so extending St. 1911, c. 751, and acts in amendment thereof as to include workmen, laborers and mechanics in the service of the Commonwealth, a county, city, or town, or district having the power of taxation.

Compensation for total incapacity as provided in St. 1911, c. 751, Part II, § 9, as amended by St. 1914, c. 708, § 4, having been properly awarded, the decree * should be affirmed.

So ordered.

J. J. Hennessy, for the defendant.

E. J. Tierney, for the plaintiff.

AXEL HILDEN *vs.* THOMAS NAYLOR.

Middlesex. January 20, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Negligence, Of one controlling real estate.

In an action by the tenant of a store in a building against his landlord, who was the owner of the building and in control of its roof and pipes, for damage to the plaintiff's goods alleged to have been caused by the negligence of the defendant in permitting a pipe or conductor leading from the roof to become leaky and out of repair, where there is evidence that at the time of the letting the roof and the pipe were in good repair, that the defendant retained control of the roof and the pipes leading from it, that a waste pipe leading from the roof directly over the plaintiff's store was overloaded, that the cap and strainer at the entrance of the pipe on the roof were allowed to become and remain detached or raised from

at the time of the accident to Patrick Crowley did not produce his present condition of general paralysis."

"10. Upon all the evidence the board must find that the present disability of the said Patrick Crowley is the immediate result of an underlying specific disease and that the accident and consequent injuries did not contribute to the producing of general paralysis.

"11. The board must find upon all the evidence that general paralysis was bound to occur to Patrick Crowley if the accident and injuries had never happened."

* Of the Superior Court made by *Brown, J.*, affirming the decision of the Industrial Accident Board.

their place so as to permit leaves from neighboring trees to enter the pipe and obstruct it until the accumulation of pent up water overflowed into the plaintiff's shop and damaged his goods, the plaintiff is entitled to go to the jury.

BRALEY, J. The plaintiff sues in tort for damages caused by the alleged negligence of the defendant, who was his landlord and the owner of the building, in "suffering the roof and water or drain pipes to be defectively constructed, leaky and out of repair," whereby "the water from the roof and waste pipes ran into the store," injuring his goods and property. A verdict for the plaintiff having been returned, the only question before us on the record is whether he was entitled to go to the jury.

The exceptions state and the jury could find, "that from the roof in question there was installed a two-inch iron pipe for carrying water from the roof of said building down through a partition wall adjacent to the plaintiff's store into the cellar and thence into a pipe which entered the sewer; that the pipe was not in the control of the plaintiff nor used by the plaintiff, nor a part of the premises rented; that subsequently to the letting of the premises by the defendant to the plaintiff the defendant connected a sink pipe with the aforesaid waste pipe directly over the plaintiff's store; that a wash basin or sink in the barber shop was connected with said drain pipe; that it had been raining during the night;" and on the following morning when the plaintiff entered his store the "goods on a table six by thirteen feet, over which there was a red cover, in the centre of the store, were wet with water, and that shoe boxes on the side of the wall of said store were wet, and some ladies' waists which were arranged upon some hangers between the aforesaid table and where the shoe cases were located in said store, and that places in the plastering were wet on the right hand side of the main door where you enter said store, and that the ceiling above the table was wet and water dripping from said ceiling; that he, with the barber, when the barber came in the morning and opened the shop, one Oberg and Erickson went to the room occupied as a barber shop on the second floor and directly above said store, and found a little water on the floor, and the barber's bowl connected with the pipe in question was full of water; that there were some pieces of leaves on the floor and in the wash bowl; that he afterwards went upon the roof with Oberg and Erickson through a scuttle where, near the entrance to

the roof, he found the drain pipe in question was located in the valley of the roof; that the valley extended from the point of entrance upon said roof in an opposite direction a distance of about eighteen feet; that a round shaped copper cap, with holes perforated to allow the water to pass down through into the pipe, covered the entrance to said waste pipe in the roof; that the cap was loose except one side, and it was slightly turned up at one edge from an inch to an inch and a half. There were leaves on the roof," and "Oberg and Erickson corroborated the plaintiff on all the foregoing." The plaintiff offered evidence of two witnesses who testified that "a plumber came there, employed by the owner of the building, and removed a piece of the sheathing in the store which covered said pipe, and in boring a hole into the pipe some water spurted out three or four feet; that they put wire up and down the pipe and tested for obstructions; that the aforesaid waste or drain pipe entered the cellar or basement at a sharp angle." The plaintiff further testified that two or three months before the loss a fire having occurred on the second floor in another part of the building, he went to the roof and saw the defendant standing by the pipe in question, "and that the defendant put his foot on the cap and pressed it down." Several witnesses testified to the condition of the stock although they did not know where the water came from, and "that there were trees extending over the roof of the building." It was agreed "that the purpose of the cap over the pipe was to prevent dirt and leaves entering the pipe," and "that the floor in the barber shop from the sink or wash bowl pitched slightly in the direction of the centre of the plaintiff's store," and that a partition directly over the centre of the plaintiff's store separated the barber's shop from an adjoining room. While the evidence introduced in behalf of the defendant strongly tended to show that the roof, cap and waste pipe were in proper repair and not defective, and that there were no trees in such proximity to the building that leaves therefrom might lodge in the gutter and pass into and clog the pipe or the conductor leading from the roof, the credibility of the witnesses was for the jury, and, if they accepted the plaintiff's testimony as a true statement of the conditions of which he complained, this affords no ground for reversal. *Lancaster v. Stanetsky*, 221 Mass. 312.

It also was a question of fact whether the defendant retained

control of the roof and waste pipe. *Poor v. Sears*, 154 Mass. 539, 548, 549. The entire building had not been let to the plaintiff, and the jury could find, as recited in the exceptions, that "the pipe was not in the control of the plaintiff, nor used by the plaintiff, nor part of the premises rented," and that at the time of letting, the roof and pipe were in good repair. The duty rested on the defendant to maintain them in this condition during the plaintiff's tenancy. *Freeman v. Hunnewell*, 163 Mass. 210. *Lydecker v. Brintnall*, 158 Mass. 292, 298. And, if through his negligence the waste pipe was overloaded or the cap and strainer were allowed to become and remain so detached or raised from their place in the valley of the gutter as to permit the entrance of leaves causing the pipe to become obstructed until the accumulated and pent up water overflowed the plaintiff's premises, the defendant cannot avoid liability. *Watkins v. Goodall*, 138 Mass. 533.

It is to be assumed that appropriate instructions were given. The presiding judge * for the reasons stated properly declined to rule "that upon all the evidence the plaintiff was not entitled to recover."

Exceptions overruled.

The case was submitted on briefs.

T. Hillis, for the defendant.

J. A. Anderson, for the plaintiff.

MORRIS GRAY & another, trustees, vs. AUGUSTUS HEMENWAY & others.

Suffolk. January 21, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Capital and Income. Trust, Duties of trustee. Corporation, Dividend.

Where a dividend is declared on shares in a corporation that are held by a trustee under a trust requiring the payment of the net income to certain beneficiaries for life with an ultimate remainder over of the principal of the fund, and where the vote of the directors of the corporation recited that such dividend was

* *Bell, J.*

"declared out of accumulated surplus profits of this company," which recital is true, the whole of the dividend must be treated as income and distributed to the beneficiaries for life, although the larger part of the dividend is payable in shares of another corporation and the whole dividend amounts in value to \$33.30 on each share of \$100. Following *Gray v. Hemenway*, 206 Mass. 126, and *Gray v. Hemenway*, 212 Mass. 239.

A dividend made by a corporation from its accumulated surplus profits is none the less to be treated as income because a part of the surplus came from a special dividend that it received upon the shares of another corporation held by it and which was derived by such other corporation from its profits in the sale of certain property held by it.

Nor is such a dividend any the less to be treated as income because derived in part from profits gained in the conversion into shares of certain convertible bonds previously issued by the corporation.

It seems, that, where a corporation holds shares of another corporation as a part of the corporate property used in its business but does not permanently capitalize the shares, such shares are available for distribution in a dividend of surplus profits when no longer needed as "floating capital."

DE COURCY, J. On January 8, 1914, the directors of the Union Pacific Railroad Company declared a dividend upon the common shares, to the holders thereof on March 2, 1914, of the following amounts upon each share: \$3 in cash; \$12 in preferred stock of the Baltimore and Ohio Railroad Company, charged to profit and loss at the rate of \$80 per share; and \$22.50 in common stock of the Baltimore and Ohio Railroad Company, charged to profit and loss at \$92 per share. At these rates the aggregate dividend was equivalent to \$33.30 a share (\$3 and \$9.60 and \$20.70).

The trustees under the will of Augustus Hemenway, holding twenty-five hundred shares, received in payment of the above dividend three hundred preferred and five hundred and sixty-two and a half common shares of the Baltimore and Ohio Railroad Company; \$7,555.82 in cash (including accrued interest upon the sum appropriated for the dividend during a period of delay in payment), and afterwards \$2,286 for dividends received upon the shares comprised in this dividend during the postponement. They now ask the direction of this court* regarding the disposition of the dividend; namely, whether it belongs to the principal of the trust fund, or is income which should be distributed to the life tenants.

The answer fundamentally depends upon whether the dividend

* At the request of the parties the case was reserved by *Pierce, J.*, for determination by the full court.

in question was paid from the accumulated surplus earnings, or out of capital of the corporation. If it was a payment of earnings, it must be considered as income for the purposes of the trust, although the amount distributed was unusually large, and consisted partly of shares in another corporation. *Gray v. Hemenway*, 212 Mass. 239. *Talbot v. Milliken*, 221 Mass. 367.

The resolution of the board of directors by which the extra dividend in question was declared expressly recited that the dividend "be and is hereby declared out of accumulated surplus profits of this company." When we go behind the records of the directors and look at the substance of the transaction, we are not convinced by the argument of the remainderman, that the corporation did not have a sufficient surplus to which the dividend could be charged as a dividend of income, and that hence the payment in fact was one out of capital. At that time the assets and liabilities of the Union Pacific Railway Company were substantially the same as set out in the latest balance sheet, which showed surplus assets of \$157,647,985.06. Of this \$28,000,000 was reserved for possible depreciation of securities, leaving an unappropriated surplus of \$129,647,985.06; while the aggregate amount required for the dividend was \$74,020,372.

It is urged that this surplus was insufficient because it included \$58,680,000 which was the special dividend received in 1910 on its Oregon Short Line Railroad Company stock, and derived by the latter from its profits in the sale of its Northern Securities Company investments; and also included \$15,868,200 profits gained between 1907 and 1913 in the conversion into shares of the Union Pacific convertible bonds of 1907. But aside from the fact that with these sums excluded there still would remain more than enough surplus to satisfy the dividend in question (\$74,020,372), these two sums were profits available for dividends, as was decided in *Equitable Life Assurance Society v. Union Pacific Railroad*, 212 N. Y. 360, 367, *Balch v. Hallet*, 10 Gray, 402, 404, *Harvard College v. Amory*, 9 Pick. 446, 463.

It is further contended by the remaindermen that the portion of the dividend in question which consists of Baltimore and Ohio Railroad Company stock was a capital asset of the Union Pacific Railroad Company, and that the distribution of this stock was a dividend of capital, and should be regarded as part of the corpus

of the trust fund. The facts in the case indicate that the dividend in question was declared in contemplation of the reduction of the regular dividend rate from ten to eight per cent; and that the amount and character of the extra dividend was determined with a view to compensate the stockholders for this reduction, by distributing property which would yield to them an income counteracting the reduction. It was not, however, a dividend in liquidation or partial liquidation of the capital stock of the corporation or of capitalized profits used in its business, as in *Gifford v. Thompson*, 115 Mass. 478, *Heard v. Eldredge*, 109 Mass. 258. See *Gray v. Hemenway*, 212 Mass. 239. These Baltimore and Ohio Railroad Company shares were bought from the Oregon Short Line Railroad Company just before the dividend in question. From the time of their purchase by the latter company in 1901 and 1903 these shares were not owned by the Union Pacific, and could not have been dealt with except through the corporate action of the Oregon Short Line, even though the Union Pacific was the beneficial owner of all the shares of the Oregon Short Line. *Brighton Packing Co. v. Butchers Slaughtering & Melting Association*, 211 Mass. 398, 403. *Smith v. Hurd*, 12 Met. 371, 385. So that, even assuming that the Southern Pacific and Northern Pacific shares, (with the proceeds of which the Baltimore and Ohio stock was acquired by the Oregon Short Line Railroad Company) originally had the character of capital impressed on them so far as they were purchased with the proceeds of Union Pacific convertible bonds, they had lost that character when sold to the Oregon Short Line. Such character would be transferred to the funds received by the Union Pacific Company in their place. *Springfield Institution for Savings v. Copeland*, 160 Mass. 380, 384.

Further, even if we could trace into the Baltimore and Ohio shares the Southern Pacific and Northern Pacific shares or their proceeds, it is difficult to see how the latter ever had impressed on them the character of capital of the Union Pacific Company. They were a part of the corporate property, used in the business of the corporation, but not permanently capitalized, and were available for distribution when no longer needed as "floating capital." *Equitable Life Assurance Society v. Union Pacific Railroad*, 162 App. Div. (N. Y.) 81; 212 N. Y. 360. *Hemenway v. Hemenway*, 181 Mass. 406, 411. *Balch v. Hallet*, *ubi supra*. In view of that

fact it is unnecessary to dwell upon the contention of the life tenants that even the original purchase of the Southern Pacific and Northern Pacific shares by the Union Pacific was not made out of capital.

On the facts we cannot say that capital of the corporation was distributed under guise of a dividend, and our decision must be governed by *Gray v. Hemenway*, 206 Mass. 126, and *Gray v. Hemenway*, 212 Mass. 239, and the authorities cited in those cases.

The trustees are to be instructed that this dividend should be treated as income and distributed to the life tenants in accordance with the terms of the will. The costs of the litigation are to be charged upon the principal of the fund. *Gray v. Hemenway*, 212 Mass. 239, 243.

So ordered.

B. L. Young, for the plaintiffs, stated the case.

J. L. Thorndike, (*F. V. Barstow* with him,) for the beneficiaries for life.

J. G. Palfrey, guardian *ad litem*, and for the remaindermen.

CHARLES A. LINEHAN & another vs. MARY A. LINEHAN.

Middlesex. January 21, 24, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Probate Court, Late entry of appeal.

Upon a petition under R. L. c. 162, § 13, which provides that "If a person who is aggrieved [by a decree of the Probate Court] omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case, the supreme court of probate . . . may, upon his petition and upon terms, allow an appeal to be entered and prosecuted," it appeared that no notice of the appeal had been filed in the registry of probate as required by § 10 and that, near the end of the thirty days mentioned in that section, the petitioner went to the clerk's office for the purpose of having an appeal entered and, without paying or tendering any entry fee, left "upon the counter" or gave "to someone whom he met there" a paper purporting to be a "copy of the objections," that the next day, when the paper was discovered, notice of the finding of the paper was sent by the clerk to the office of the petitioner's counsel, that the only reply received was that the member of the firm in charge of the case

"was away and to hold on to the paper," and that thereafter the thirty days expired without anything more being done. *Held*, that no sufficient excuse for the omission of the steps necessary for taking and perfecting an appeal was shown and that the petition should be dismissed.

BRALEY, J. The petitioners having failed to enter their appeal in this court within thirty days after the entry of the decree in the Probate Court as required by R. L. c. 162, §§ 9, 10, are compelled to rely on § 13, which provides, that "If a person who is aggrieved omits, without default on his part, to claim or prosecute his appeal and it appears that justice requires a revision of the case, the supreme court of probate . . . may, upon his petition and upon terms, allow an appeal to be entered and prosecuted." *Bartlett v. Slater*, 183 Mass. 152.

It was said in *Capen v. Skinner*, 139 Mass. 190, 191, that under Pub. Sts. c. 156, § 9, of which the R. L. c. 162, § 13, is a re-enactment, "A petitioner is required to prove, to the satisfaction of this court, not only that there is no default on his part, but that substantial justice requires a revision of the case." If the petition is opposed, the petitioner has the burden of proving that the absolute right to claim or prosecute an appeal has been lost through no fault of his own, or the discretionary powers of the court to allow a revision cannot be successfully invoked. *Kent v. Dunham*, 14 Gray, 279, 281. *Briggs v. Barker*, 145 Mass. 287. *Daley v. Francis*, 153 Mass. 8, 10, 11. *Cawley v. Greenwood*, 192 Mass. 126.

Upon this question the findings of the single justice * are amply supported by the evidence. The petitioners at the hearings upon the account were represented by competent counsel, who had been seasonably instructed after an adverse decree to take and perfect an appeal, and for whose acts or neglect to act the petitioners are bound as well as by their own conduct. *Kent v. Dunham*, 14 Gray, 279, 281. *McKenna v. McArdle*, 191 Mass. 96, 99. R. L. c. 162, § 40.

But no notice of appeal had ever been filed in the registry, or notice given to the appellee, or copy of the record procured as required by § 10, and it was not until the time was about to expire

* *Carroll, J.* The appeal sought to be entered was from a decree of the Probate Court allowing the first account of Mary A. Linehan, the mother of the petitioners, as trustee under the will of her late husband Charles Linehan, late of Cambridge.

that, upon being furnished by counsel with what purported to be a "copy of the objections," one of the petitioners, apparently with knowledge of the contents, went to the clerk's office for the express purpose of having the alleged appeal properly entered. The paper without the payment or tender of any entry fee was left "upon the counter;" or given "to some one whom he met there;" and, upon its discovery the next day, the paper "had no mark or signature to indicate that it had ever been received, or entered, or filed in the office." It was not however too late even then to have entered the paper or alleged appeal, yet, upon notice to the office of the petitioners' counsel of the finding of the paper, the only reply received at the clerk's office was, that the member of the firm in charge of the case "was away and to hold on to the paper," and nothing more was done until this petition was brought.

The failure to comply with the statute plainly does not rest on any accident, surprise or mistake which a reasonably diligent and careful man would not be expected to anticipate and guard against. *Clark v. Brigham*, 22 Pick. 81. *Hutchinson v. Gurley*, 8 Allen, 23. *Boston v. Robbins*, 116 Mass. 313, 315. *Keene v. White*, 136 Mass. 23. And no sufficient excuse for doing away with the steps necessary for taking and perfecting an appeal appears.

But, even if the petitioners are "in default," we add that, having carefully read the evidence reported, no substantial reason is shown for reversal of the further findings of the single justice exonerating the appellee as trustee from the charge of maladministration, upon which the petition is grounded.

The decree dismissing the petition should be affirmed with costs.

Ordered accordingly.

J. B. Vallely, for the petitioners.

T. H. Buttimer, for the respondent.

WILLIAM FREEMAN vs. UNITED FRUIT COMPANY.

Suffolk. January 24, 25, 1916. — March 3, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Toward licensee, Wilful or reckless conduct, Agreement to assume risk.
Contract, Validity. *Evidence*, Materiality, Interrogatories. *Practice*, Civil,
Conduct of trial: interrogatories, argument to jury.

A tailor, who is sent for by the wireless telegraph operator on a vessel lying in port to bring on board a uniform that he has made for the operator to be tried on, and who is injured by a heavy bundle of canvas being dropped upon him from a great height, having been permitted to come on board the vessel for his own pecuniary gain, is a mere licensee, and the company owning and operating the vessel owes to him while on board merely the duty to refrain from wilfully or recklessly injuring him.

In an action for injuries received in the manner above described, it is evidence for a jury of wilful, wanton or reckless conduct on the part of the servants of the owner of the vessel, that a roll of canvas, which struck the plaintiff while he was on the main deck and broke his leg, was thrown deliberately over the rail from the upper or boat deck without the slightest consideration for the safety of whomsoever might be in the path of the canvas as it descended.

If a person was on a vessel lying in dock under a pass in writing which he accepted and used, on which it was stipulated that "The person accepting this Free Permit, in consideration thereof, assumes all risks of accident, and expressly agrees that the [owner of the vessel] shall not be liable under any circumstances whether by negligence of its agents or otherwise for any loss or injury to the person using this permit on steamer, gangway, or pier property," he cannot maintain an action against the owner of the vessel for injuries caused by a heavy roll of canvas being recklessly thrown down upon him by the owner's servants when he was on the main deck.

The contract contained in such a pass is not void as contrary to public policy or the policy of the law.

In an action brought for the injuries caused in the manner above described, it is proper for the defendant to ask one of its witnesses, who was a sailor on board the vessel, "whether or not a parcel of canvas one and a half feet thick" and from twelve to fourteen feet long, as described by the witness, "could have been conveniently carried down the stairways," this having some bearing on the question of recklessness.

In the same action the plaintiff can put in evidence the orders given by the boatswain, in reply to an inquiry by one of the sailors whether the canvas was to be carried down or dropped down, "Throw it down; take a chance and throw it down."

In an action against a corporation for personal injuries, the plaintiff in his cross-examination of a witness for the defendant may make use of the substance of an answer to one of the interrogatories propounded by the plaintiff to the de-

defendant's president, this being a way of putting the answer in evidence; and, if the defendant does not choose to put in evidence the interrogatory and the entire answer to it or all the interrogatories and answers relating to that subject, this does not deprive the plaintiff's counsel of the right afterwards to refer to the substance of the answer in his closing argument to the jury.

BRALEY, J. The action, which is tort for personal injuries, was submitted to the jury on the first count of the declaration which alleges, that while the plaintiff was lawfully on the defendant's steamship lying at her dock, he "was severely injured by the wanton and reckless conduct of the defendant, its servants or agents, in hurling or dropping against him from a great height a large bundle of canvas." A verdict having been returned for the plaintiff, the questions raised by the defendant's exceptions to the admission and exclusion of evidence, to the refusals to rule as requested and to the instructions defining the plaintiff's status while on the ship are presented for decision.

The first inquiry is, What were the plaintiff's legal rights at the time of the injury? While not conceded, the jury, independently of the pass under which the defendant contended he was only allowed on board, would have been warranted in finding upon undisputed evidence, that the plaintiff, a tailor, whose business consisted largely in making, repairing and cleansing clothes for sailors and uniforms for officers of steamships, numbered among his customers the crews and officers of the defendant company with whom he had dealt for many years; and that, some time before the accident and while on the defendant's ship, he had received an order "from the operator of wireless telegraphy" to make a uniform with the exception of the buttons which were to be furnished by the customer. It was admitted by the defendant, that the operator was properly on the ship and that the uniform was to be worn by him in connection with its "business." The uniform being ready, the plaintiff notified the operator to come to his shop, but, upon being informed that he could not attend, coupled with a request for him to come to the ship at an hour named, the plaintiff complied, and, while passing to the room of the operator, the accident happened. It further could have been found upon all the evidence, that the defendant's officers ought to have known of the plaintiff's previous course of business with the company's employees, among whom the jury could say the operator should

be classed. The plaintiff, however, having been permitted to transact business on the defendant's ships solely for his own pecuniary gain, was but a licensee, to whom the defendant owed no duty except to refrain from wantonly and wilfully causing him harm. *Reardon v. Thompson*, 149 Mass. 267, 268. *Dickie v. Davis*, 217 Mass. 25, 30.

The further inquiry is whether there is evidence of a breach of this obligation. No question of the defendant's negligence or the plaintiff's due care is involved. The first count of the declaration does not allege carelessness. It charges the commission of a wrong by the company, which is liable for the acts of its servants done wilfully, recklessly or wantonly in the course of their employment. *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 274. *Yancey v. Boston Elevated Railway*, 205 Mass. 162, 171. The plaintiff was not required to prove a particular purpose or intention to harm him. Where personal injuries are thus caused the defendant is held to have intended the natural consequences of what he does, and "there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes by reason of a reckless disregard of probable consequences a wilful wrong." *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 271. *Fotler v. Moseley*, 185 Mass. 563, 565. *Romana v. Boston Elevated Railway*, 218 Mass. 76. Bigelow on Torts, (8th ed.) c. 3, § 2.

The complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence, and the jury properly could find that the roll of canvas stiffened with ice which struck the plaintiff while on the main deck, breaking his leg, was deliberately thrown over the rail from the upper or boat deck without the slightest consideration for the safety of whomsoever might happen to be in the way as the canvas descended. *Pierce v. Cunard Steamship Co.* 153 Mass. 87, 88, 89. *Commonwealth v. Byard*, 200 Mass. 175, 177. The presiding judge * therefore rightly declined to rule, that there was no evidence "that the accident was caused by wilful or wanton and reckless conduct on the part of the defendant's servants."

* *Raymond, J.*

But, as the jury could have found on conflicting evidence that the plaintiff had accepted and used a pass, the conditions of which read, "The person accepting this Free Permit, in consideration thereof, assumes all risks of accident, and expressly agrees that the United Fruit Company shall not be liable under any circumstances whether by negligence of its agents or otherwise for any loss or injury to the person using this permit on steamer, gangway, or pier property," the further question for their decision was whether in the prosecution of his business he went aboard the ship solely because of the permission conferred by the pass. The plaintiff, if he acted under it, is bound by the conditions of the contract, and consented to take things as he found them, including the chance of injury from not merely their negligent, but the wanton and reckless acts of the defendant's servants when about their work. *Quimby v. Boston & Maine Railroad*, 150 Mass. 365. *Hosmer v. Old Colony Railroad*, 156 Mass. 506, 508. *Doyle v. Fitchburg Railroad*, 166 Mass. 492, 495. *Payne v. Terre Haute & Indianapolis Railway*, 157 Ind. 616. *McCawley v. Furness Railway*, L. R. 8 Q. B. 57.

The plaintiff urges, that, if held to embrace the wrong alleged, the conditions are void because violative of public policy or the policy of the law. But the defendant had abandoned no duty it owed to the public as a carrier or to the plaintiff merely as a member of the community. It is unnecessary to go so far as to decide whether a landowner, by whom a like permission had been given to enter upon his premises, would be liable in damages to the licensee while there for injuries inflicted by spring guns, traps, or ferocious animals kept and maintained by him. See *Marble v. Ross*, 124 Mass. 44; *Yancey v. Boston Elevated Railway*, 205 Mass. 162; *O'Brien v. Union Freight Railroad*, 209 Mass. 449, 452; *Reardon v. Thompson*, 149 Mass. 267, 268.

The jury should have been instructed as the defendant requested, that if they found the plaintiff was on the steamship by reason of the pass he could not recover, and the refusal so to rule was erroneous.

We do not deem it necessary to review the instructions given, except to say that but for this omission the grounds of liability were accurately stated, and that when read in their entirety they are not open to the objections and criticisms urged by counsel.

As there must be a new trial a word as to the rulings on evidence is pertinent. The question asked by the defendant of its witness, a sailor who participated in rolling up the canvas and throwing it over, "whether or not a parcel of canvas one and one half feet thick" and from twelve to fourteen feet long, as testified by the witness, "could have been conveniently carried down the stairways" should have been admitted, as it had some bearing on the question of recklessness.

The orders given by the boatswain in reply to the inquiry of one of the men, whether the canvas was to be carried or dropped down, "Throw it down; take a chance and throw it down," were properly admitted in evidence. The jury could find that he was in charge of the men and represented the defendant. *Ruddy v. George F. Blake Manuf. Co.* 205 Mass. 172.

Nor was there error in the use by the plaintiff in his cross-examination of a witness for the defendant of the substance of one of the answers to interrogatories propounded by the plaintiff to the defendant's president. It had the effect of putting in evidence the portion used. The defendant could then have introduced not only the interrogatory and the entire answer, but all the interrogatories and answers relating to that issue. It not having done so, the subsequent reference thereto by the plaintiff's counsel in his closing argument to the jury was also unexceptionable. *R. L. c. 173, § 88. Demelman v. Burton*, 176 Mass. 363, 364. *Churchill v. Ricker*, 109 Mass. 209.

Exceptions sustained.

H. S. Davis, (*R. G. Dodge* with him,) for the defendant.

J. L. Hall, (*S. C. Rand* with him,) for the plaintiff.

JACOB KING & another vs. CHARLES H. CONNORS & others.

Franklin. January 26, 1916. — March 3, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Supreme Judicial Court. Equity Pleading and Practice, Appeal, Decree.

On an appeal by the defendants from a decree ordering the specific performance of a contract to purchase certain hotel property from the plaintiff, entered by order of a judge of the Superior Court in pursuance of the rescript stating the decision of this court in *King v. Connors*, 222 Mass. 261, where the only question presented was whether the decree appealed from conformed to the rescript, it was *held*, that the decree must be construed in the light of the findings of the master confirmed by the decision of this court, and that it was not open to the defendants to discuss any issue thus disposed of.

It appearing in the case mentioned above that the only new matter in the decree was the requirement from the plaintiff of a bond to secure the defendants from any damages they might sustain by reason of the existence of a certain lease, it was *held*, that this provision, which was inserted in the decree solely for the protection of the defendants, could give them no ground for complaint.

DE COURCY, J. The only question brought before us by the appeal is whether the decree * appealed from conforms to the rescript stating the decision of this court in *King v. Connors*, 222 Mass. 261. *Phelps v. Lowell Institution for Savings*, 214 Mass. 560. The defendants have not sought leave to open the case for a new trial by reason of matters which have arisen since the decision of the issues raised by the pleadings; and no such alleged facts can be considered on this appeal. The decree must be construed in the light of the facts as found by the master, and confirmed by this court. *Attorney General v. New York, New Haven, & Hartford Railroad*, 201 Mass. 370.

The complaint of the defendants is that the decree compels them to accept a title which is subject to "the possibility of a part of said premises being subject to lease referred to in Supreme Court opinion." Their brief is mainly a reargument of one of the main issues already tried and decided adversely to their contention. The opinion, based on findings of the master, which were not excepted to by the defendants, expressly stated: "The tenant

* Entered in the Superior Court by order of *Sanderson, J.*

. . . had promised in writing to execute a release and surrender the premises whenever required, within thirty days. This was a sufficient compliance with the contract." *King v. Connors, supra*. A rehearing on this issue is not opened by the appeal. See *Nashua & Lowell Railroad v. Boston & Lowell Railroad*, 169 Mass. 157, 162.

The only new matter in the decree is the requirement that the plaintiffs shall give a bond to secure the defendants from such damages as may be caused to them by reason of the alleged lease. This clause was inserted solely for the protection of the defendants, and in itself furnishes no ground for complaint.

Decree affirmed with costs.

F. J. Lawler, for the defendants.

H. E. Ward, (*W. A. Davenport* with him,) for the plaintiffs.



WILLIAM S. HALL & another, administrators *de bonis non*, vs.
C. PHILIP BEEBE & others.

Middlesex. January 26, 1916. — March 3, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Devise and Legacy. Trust. Tax, On legacies and successions.

A testator by the residuary clause of his will created a trust, in regard to which he made the following provision: "I desire that this Trust terminate ten years after the decease of my wife E, and the original Trust Fund be divided equally between my two children E and W. . . . If either of my children die without issue, before the termination of this Trust, I wish one-half part of the income he or she would receive if living be given to the surviving child, & the other half part to such Charitable and Educational purposes as my Trustees shall see fit. If both children die without surviving issue then I wish the whole income to be given to Charitable and educational purposes as before mentioned and at the termination of this Trust if both children shall have died without issue surviving I wish the property to be given to such Charitable and educational purposes as the Trustees think best, unless either child shall have left a wife or husband, then I desire the Trustees to give to such wife or husband such proportion of the income or original fund as they think would be given by me if I were then alive." Upon the termination of the trust, ten years after the death of the testator's widow, the administrator of the estate of the testator's daughter, E, who died intestate six years after the death of her mother, leaving a husband and two children, brought a bill for instructions. The husband and

one of the surviving children of the plaintiff's intestate had died before the termination of the trust, and when the bill was filed a surviving son of the intestate was her only heir at law. The plaintiff asked to be instructed whether his intestate had an estate in the principal of the trust fund at the time of the termination of the trust which passed to her son and was subject to a succession tax or whether her interest was divested at her death and her son took what had been her share as a legatee under the will of his grandfather, the original testator. *Held*, that the plaintiff's intestate upon her father's death took a vested estate in one half of the principal of the trust fund, which was to come to her upon the termination of the trust, subject to be divested by the happening of certain contingencies which did not occur, and that her son upon the termination of the trust took this half of the trust fund as her heir at law and next of kin, so that under St. 1909, c. 490, Part IV, § 1, the Commonwealth was entitled to collect a succession tax upon the passing of the property.

DE COURCY, J. At the date of the execution of the will of William Appleton, December 4, 1876, his son, William Appleton, Jr., was unmarried, and his daughter, Emily Appleton Beebe, was married and had a son, Arthur Appleton Beebe, who was about four years old.

The testator, after giving to his wife the use of his house in Nahant, and of his house and stable in Boston with their contents, gave the residue of his estate to trustees. By the residuary clause there was given to his wife for life or until remarriage an annuity of not more than \$20,000; and to his two children the yearly income above that sum after May 11, 1882, and also the widow's share of the income in the event of her death or remarriage. The portion of that clause with which we are concerned is as follows:

"I desire that this Trust terminate ten years after the decease of my wife Emily, and the original Trust Fund be divided equally between my two children Emily and William. . . . If either of my children die without issue, before the termination of this Trust, I wish one-half part of the income he or she would receive if living be given to the surviving child, & the other half part to such Charitable and Educational purposes as my Trustees shall see fit. If both children die without surviving issue then I wish the whole income to be given to Charitable and educational purposes as before mentioned and at the termination of this Trust if both children shall have died without issue surviving I wish the property to be given to such Charitable and educational purposes as the Trustees think best, unless either child shall have left a wife or husband, then I desire the Trustees to give to such wife or

husband such proportion of the income or original fund as they think would be given by me if I were then alive."

The widow of the testator died on May 29, 1905. His daughter, Emily Appleton Beebe, died on March 25, 1911, intestate, leaving surviving her husband, James Arthur Beebe, and her two children, Emily E. Beebe and C. Philip Beebe. The daughter, Emily E. Beebe, died intestate on July 21, 1913, and James Arthur Beebe died testate on November 27, 1914. The trust terminated on May 29, 1915. The petitioners, as administrators of the estate of Emily Appleton Beebe, deceased daughter of the original testator, ask the court to determine what interest, if any, the estate of their intestate had in the principal of the trust fund upon the termination of the trust.* The parties apparently have arranged a distribution of the property satisfactory to themselves, and are now interested in the question of taxation. The controlling question is whether the defendant C. Philip Beebe takes his share of the trust fund as the heir of his mother, Emily Appleton Beebe, or as a legatee under the will of his grandfather, William Appleton.

It is evident from an examination of the entire will that the dominant purpose of the testator was to provide for his family. As already indicated, the only bequest made out of the income in favor of charity and education is conditional on the death without surviving issue of one or both of his children, before the termination of the trust, and the gift of principal is conditional on the death of both children without issue surviving at the termination of the trust. In both events, the charitable and educational purposes which may benefit are left entirely to the selection of the trustees, with no suggestion to indicate any preference on the part of the testator. The reasonable explanation seems to be that the death, before the end of the trust period, of his son, who was only twenty-eight years old, and of his daughter and grandson, and any future issue, was not contemplated as likely to occur, and that he was only providing for events which were possible but not probable, and which in fact never happened.

Having in mind almost exclusively the interests of his family, the testator expressly provided that on the termination of the

* The case was reserved by *Pierce, J.*, upon the pleadings and agreed facts for determination by the full court.

trust, ten years after the decease of his wife, "the original Trust Fund shall be divided equally between my two children Emily and William." This gave to the daughter Emily E. Beebe an absolute vested one half interest in the trust property, unless it was cut down by the subsequent language in the will. As already stated, the contingencies which might have divested the absolute gift made to her never in fact happened, and it has been held that similar language divests an absolute gift already made only upon the happening of the express contingency. When the contingency mentioned becomes impossible the absolute estate remains. *Richardson v. Noyes*, 2 Mass. 56. *Brightman v. Brightman*, 100 Mass. 238. *Symmes v. Moulton*, 120 Mass. 343. *Hooper v. Bradbury*, 133 Mass. 303. *Gillie v. Marsh*, 186 Mass. 336, 340. See *Clarke v. Fay*, 205 Mass. 228, 235.

There are significant omissions in the will which enforce the view that the testator intended to give to his daughter a vested interest that was absolute. After he had disposed of all the income and principal of the trust fund in the event of his children living beyond the trust period, he proceeded to make express provision for the contingency of the death of one or both children before the termination of the trust. If either of them should die without issue, one half of his or her share of the income was to go to the survivor, and the rest to charitable and educational purposes. But he did not undertake to say what disposition should be made of the principal of such deceased child's share. What is still more significant, he made no provision as to either the principal or income in the event of the death of one of his children, leaving issue. Yet he must have contemplated the possibility of what did happen in fact, the death of his daughter Emily and the survival of her children. It seems to us that the reasonable inference from these omissions is that he intended to have these children take as the legatees or distributees of their mother, to whom he had left one half of the principal of his property.

The contention of the defendant C. Philip Beebe that one half of the entire principal of the trust estate comes to him directly as a legatee under his grandfather's will is based upon a series of gifts by implication. This would require us to read into the will a divesting of the vested interest of Mrs. Beebe upon her death in 1911 and an implied gift to her two children Emily E. and C.

Philip, a divesting of the interest of Emily E. on her decease in 1913 and an implied gift to her brother C. Philip, subject to be divested in the event of his death without issue before the termination of the trust. Any such gifts by implication must find support in the language used in the will, and are not to be supplied by the court unless it is clear from the will as a whole that the testator must necessarily have intended an interest to be given which is not bequeathed by express words. *Metcalf v. Framingham Parish*, 128 Mass. 370. *Jones v. Gane*, 205 Mass. 37, 44.

In our opinion, the more reasonable interpretation of the will is that Emily Appleton Beebe was given a vested interest in fee in one half of the principal of the trust fund with its accumulations, subject to be divested only upon the happening of certain contingencies in the nature of conditions subsequent, namely, the death of both herself and her brother without leaving issue surviving at the termination of the trust. As this event has not occurred, the executory devise over never became effective. Accordingly at the termination of the trust the interest of Mrs. Beebe passed to her heirs at law and next of kin; and the Commonwealth is entitled to collect a tax on all interests in the fund which passed upon her death. St. 1909, c. 490, Part IV, § 1. The plaintiffs are so instructed, and in accordance with the agreement of the parties the tax is to be paid from the trust funds in the hands of the defendant trustees.

Decree accordingly.

W. H. Garland, for the defendant C. Philip Beebe.

W. H. Hitchcock, Assistant Attorney General, for the Treasurer and Receiver General.

F. C. Welch, for himself and his co-trustees under certain deeds of October 20 and 26, 1915.

BENJAMIN M. THOMAS vs. MICHAEL BURNC.

Suffolk. January 10, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Small Loans Act. Equity Jurisdiction, Under small loans act. Equity Pleading and Practice, Bill.

Although under the small loans act notes given in violation of its provisions are declared by St. 1911, c. 727, § 17, as amended by St. 1912, c. 675, § 5, to be void, and the amount of any unlawful interest paid upon them may be recovered back in an action at law, a remedy in equity also is given expressly by St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4.

In a suit in equity under St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4, to recover the amount of unlawful interest paid on notes made void by the small loans act, where the bill prays for an accounting, although the defendant may be entitled to be paid so much of the loans as were not made in contravention of the statute or of the general principles of equity, yet it is not necessary for the plaintiff's bill to contain an offer to pay the defendant any amount that may be found to be due to him upon the accounting prayed for, and the omission of such an offer is no ground of demurrer.

In such a suit in equity to recover back unlawful interest paid on void notes, where the allegations in the plaintiff's bill were somewhat vague and informally stated, it was *held*, that the facts intended to be relied upon were stated with sufficient clearness to allege proper grounds for relief.

PIERCE, J. The facts intended to be stated in the bill of complaint are that the plaintiff before July 19, 1911, the day of the enactment of St. 1911, c. 727, was a borrower and the defendant a lender of sums of money less than \$300 at rates of interest greater than is permitted by § 3 of that act; that before the enactment of that act with each loan a note was given in amount corresponding to the sum of money actually lent; that after the enactment of the act the plaintiff continued to borrow and the defendant to lend as before sums of money in each instance less than \$300 at rates of interest prohibited by law, but, because the defendant was not licensed to make loans as in the manner and form made and was in so doing liable to the imposition upon him of fine or imprisonment or of both under the provision of § 17 of said act, thereafter whenever a new loan of less than \$300 was made at a rate of interest greater than was permitted under § 3 of the act, a note was given, not for the sum then actually lent, but in

amount to include all sums previously lent with the result that the note as given appeared to represent a loan in excess of \$300.

The notes dated December 14, 1914, December 16, 1914, and January 2, 1915, are upon the allegations of the bill to be taken to include all unpaid loans made before July 19, 1911, all unpaid loans made between July 19, 1911, and May 29, 1912, the day of the enactment of St. 1912, c. 675, in amendment of St. 1911, c. 727, and loans of \$300 or less at a rate of interest greater than is allowed to be received by an unlicensed lender under St. 1911, c. 727, § 3, St. 1912, c. 675, § 2, made after May 29, 1912, on the day of the dates of the notes above referred to.

The prayers of the bill are that the defendant may be ordered to enter into an accounting with the plaintiff and to pay over to him the amounts which the plaintiff has paid as interest or for expenses in excess of the rates allowed by the statute; that the notes may be declared void and cancelled; that a special precept of attachment may issue; and for further relief.

Section 17 of St. 1911, c. 727, as amended by St. 1912, c. 675, § 5, reads: "... and any loan made or note purchased, or indorsement or guarantee furnished by an unlicensed person, partnership, corporation or association in violation of this act shall be void."

The defendant, as grounds of demurrer, assigns

"1. That the matter therein alleged does not set out any ground for relief in equity.

"2. That upon the plaintiff's own allegations he has a plain, adequate and complete remedy at law."

It is true the plaintiff has a complete defence at law to the notes expressly declared to be void, and it is also true that he can recover at law any unlawful interest paid to the defendant; but his remedy is not limited to the common law, since the enactment of St. 1911, c. 727, §§ 10, 13, amended by St. 1912, c. 675, §§ 3, 4, has conferred expressly also a right to maintain a suit in equity. Independently of the statute "courts of equity will grant relief against usurious contracts no matter what may be their form and will permit no shift or devise of the creditor to shield him in taking more than legal interest on a loan." *Horner v. Nitsch*, 103 Md. 498.

The defendant also assigns as a ground of demurrer:

"3. That the plaintiff's bill contains no offer to pay the defendant any amount which may be found due him upon the accounting prayed for."

This contention is not specifically argued upon the defendant's brief and may well be treated as waived; but the answer thereto may be taken to be that the statute granting the remedy in equity imposes no condition on its use. At the hearing the defendant may well be entitled to a decree for so much of the loans as were not made in contravention of any statute upon principles recognized and applied in *Bennett v. Tremont Securities Co.* 221 Mass. 218, but the failure to offer to pay such does not render the bill demurrable.

The defendant further assigns as a special cause of demurrer:

"4. For special cause of demurrer, the defendant says as to paragraphs 4, 5 and 7 of the plaintiff's bill of complaint that the matters therein alleged are not set out with sufficient definiteness and particularity so they can be understood and answered by the defendant."

We think that the allegations, while somewhat vague and informally stated, do make clear the facts intended to be relied upon and do state proper grounds for relief.

We are of opinion that a decree should be entered revoking the decree * sustaining the demurrer and dismissing the bill and that in place thereof a decree should be entered overruling the demurrer and ordering the defendant to answer over.

Decree accordingly.

M. J. Mulkern, (R. Forknall with him,) for the plaintiff.

W. M. Noble, (D. A. Marshall with him,) for the defendant.

* Of the Superior Court made by *Morton, J.*

ALICE R. DRAKE vs. METROPOLITAN MANUFACTURING COMPANY.

SAMUEL J. DRAKE vs. SAME.

‘Middlesex. January 11, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Agency, Scope of employment. Sale, Conditional.

In an action against the proprietor of a store, who sold goods under contracts of conditional sale, for an assault and battery committed on the plaintiff by an alleged agent of the defendant, when he took from the plaintiff goods that he had sold to her as a canvasser of the defendant upon the cancellation by the defendant of the contract of conditional sale before the first payment had been made on it, it appeared that ten days after the sale to the plaintiff the alleged agent had left the employ of the defendant and that about three months later he returned to the defendant's employ in the capacity of a wagon driver with men under him. It further appeared that the alleged agent when he went to demand the return of the goods by the plaintiff took with him an assistant from the defendant's store and that he returned with the goods to the store and left them there. There was evidence from which the jury reasonably could infer that the alleged agent as wagon manager and as the former canvasser who had made the sale to the plaintiff was thought by the defendant to be the person best fitted to adjust the controversy with the plaintiff and to regain possession of the goods. *Held*, that there was evidence for the jury that the defendant's alleged agent was acting within the scope of his authority when he committed the assault and battery upon the plaintiff.

TWO ACTIONS OF TORT, the first for assault and battery alleged to have been committed upon the plaintiff by one William E. Durand, an agent of the defendant, and the second by the husband of the plaintiff in the first action for consequential damages. Writs dated respectively April 13, 1911, and September 21, 1912.

In the Superior Court the cases first were tried together before *Hitchcock*, J. The jury returned verdicts for the plaintiffs, and the defendant alleged exceptions, which were sustained in a decision reported in 218 Mass. 112.

The cases were tried again before *Bell*, J. At the close of the evidence, the material portion of which relating to the only question now before this court is stated in the opinion, the defendant asked the judge to make, among others, the following rulings:

“1. On the evidence the verdict should be for the defendant.”

“9. If the defendant did, in fact, charge the goods to Durand,

the canvasser, and he was thereafter held liable for the value, his act in attempting to retake the goods was on his own responsibility, even although he may, at the time, have been employed by the defendant in some other capacity."

"13. If the defendant charged the goods to Durand, in effect making a sale to him, and he later in attempting to retake the goods committed an assault on the plaintiff, the fact that the goods were later left by him in the store of the defendant would not constitute a ratification of his acts committed in retaking them in the absence of any knowledge on the part of the defendant of the means which he had employed in so doing, and there is no evidence upon which it may be found that anyone in authority from the defendant knew the goods were left in the store."

"17. If you believe that the defendant employed Durand merely for the purpose of selling the goods, that thereafter it sent another representative to request the return of the goods, subsequently charged them to Durand, that the title of the goods at that time passed to him, and that Durand, in entering the house of the plaintiff on the day of the alleged assault did so for the purpose of obtaining possession in order that he might turn the goods back to the defendant and receive credit for their value, verdict must be for the defendant."

"19. If you believe that the defendant did on September 3, 1910, charge the goods to the plaintiff, your verdict should be for the defendant."

The judge refused to make these rulings and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of \$2,000 and a verdict for the plaintiff in the second case in the sum of \$350. The defendant alleged exceptions.

A. E. Yont, for the defendant.

R. J. Lane, for the plaintiffs.

PIERCE, J. At the close of the evidence, among other requests not now specifically argued, the defendant asked the judge to instruct the jury that "On the evidence the verdict should be for the defendant." All the evidence is not reported and although the bill of exceptions does not so state, we assume that the facts appearing in the bill of exceptions with such reasonable inferences of fact therefrom as a jury properly might draw are to be taken as all the material facts necessary to a proper determination of the

only question now raised by the defendant's bill of exceptions, to wit: "Whether Durand, at the time of the alleged assault, was acting within the scope of his employment as the agent of the defendant company."

Believing only so much of the testimony as supported the plaintiff's contention that Durand at the time when he made the alleged assault upon her was acting within the scope of his employment, the jury would have been justified in finding in substance the following facts upon the testimony of the defendant's witnesses alone. Durand as a canvasser of the defendant on July 6, 1910, entered into a contract of lease with and delivered a set of lace curtains to the plaintiff. The defendant reserved in the contract the right to cancel the lease at any time before the acceptance of a payment by an authorized collector.

Before such payment had been made the defendant in the lawful exercise of its right and in pursuance thereof notified the plaintiff on July 21, 1910, of its election to cancel the lease. It immediately thereafter made demand upon the plaintiff for a return of the goods. The plaintiff refused to redeliver the goods and a new demand was made upon the plaintiff on behalf of the defendant and was refused by the plaintiff on August 31, 1910.

On July 16, 1910, Durand left the employ of the defendant without knowledge of any purpose of the defendant to cancel the contract.

Early in October, 1910, Durand returned and entered the employ of the defendant in the capacity of wagon manager with men under him.

By special terms of his new contract it was provided that "On leases we cannot accept and verify because of their having been leased contrary to instruction, the manager will collect from the agent the amount paid by the customer and refund the same and repossess the goods."

As a canvasser Durand had authority to make contracts of lease, subject to the defendant's right to cancel at any time "until the leases are verified and one payment has been made by the customer to the regular authorized collector and accepted by us."

He also had the right and it was his duty to collect eighty cents from the customer at the time of the delivery of the goods.

As canvasser he had no further authority. Upon his return in

October, 1910, he learned for the first time that the defendant had elected to cancel the lease by notifying the plaintiff of its purpose so to do on July 21, 1910.

Durand immediately went to the house of the plaintiff, "informed her that the company had rejected the lease and that they were going to charge the goods, or had charged them, to him" and asked her to return the goods.

On November 3, 1910, Durand again went to the house of the plaintiff with one Putney, for the purpose of getting possession of the goods. After seizing the goods "he took them under his arm and went back to the store of the defendant" and placed them in the store room.

The defendant introduced evidence that under the written contract by which Durand first was employed "Agents are held responsible for leased goods until the leases are verified and one payment has been made by the customer to the regular authorized collector and accepted by us. If the collector is unable to verify or recover the goods, they will be charged to the agent at 60% and deducted from any commission, salary or security due him. If we cannot verify and accept a lease, the agent will be notified; if we cannot repossess the goods, the agent will pay for them," and contends that the jury must find upon the terms of this contract and upon all the evidence that before Durand knew of the cancellation of the lease the defendant divested itself of all interest in the goods, charged the goods to Durand and that Durand thereupon became and remained their owner.

It must be admitted that the jury could so find; but they were not bound to do so.

They could disbelieve that the defendant charged the goods to Durand, or, even if it did, that it intended to divest itself of its ownership.

Durand had left its employ, and there is nothing to show that it had any reason to think he would return or that there was any reasonable probability of satisfying its claim against him in the manner provided in the contract.

The jury might find it highly improbable that the defendant would transfer and surrender its ownership in the goods for the mere right to charge to and deduct from any commission, salary or security due Durand who was no longer in its employ.

On the other hand, it was reasonably possible for the jury to infer and believe that the defendant had not transferred its ownership to Durand but that it continued to retain it and with it the right and desire of possession.

They could also reasonably infer that Durand as wagon manager and ex-agent and canvasser was thought by the defendant to be best fitted to adjust the controversy with the plaintiff and that he was accordingly directed to take the matter in charge and to regain possession of the defendant's property.

This inference is strengthened by the fact that Durand took with him an assistant from the store of the defendant, returned with the goods to the store room and left them there.

The facts do not seem in any essential particulars to differ from those presented when this case was formerly before this court. *Drake v. Metropolitan Manuf. Co.* 218 Mass. 112.

The presiding judge could not properly have given the requests of the defendant and the exceptions must be overruled.

So ordered.

NORA M. GREEN vs. EDWARD J. HAMMOND & another, trustees.

Norfolk. January 11, 12, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Landlord and Tenant. Negligence, Of one controlling real estate, Res ipsa loquitur. Evidence, Presumptions and burden of proof. Dumb-waiter.

The unexplained fall of an ordinary dumb-waiter, which is operated by two ropes, connected with an apartment occupied by a tenant for whose purposes it is used exclusively, is no evidence of a defect in the condition of the dumb-waiter or of negligence in maintaining it.

Where the lessee of an apartment has by the terms of his lease the right to the exclusive enjoyment and control of a dumb-waiter, the lessor is not required to inspect the dumb-waiter or to keep it in repair.

The owner of a building containing apartments, who has leased the entire building to another and has retained no control over any part of it, cannot be held liable to a sublessee of an apartment for a want of repair in a dumb-waiter used in connection with that apartment.

TORT against Edward J. Hammond and Arno J. Pendleton, trustees of the Beacon Street Corner Trust, for personal injuries sustained by the plaintiff on May 31, 1913, at about five o'clock

in the afternoon, from the falling of a dumb-waiter upon her wrists when the plaintiff was using it in connection with the apartment occupied by her in a house belonging to the defendants. The first count of the declaration alleged a failure to maintain the dumb-waiter in a safe and proper condition for the plaintiff's use and the third count alleged that the dumb-waiter was constructed in an unsafe and dangerous manner. The other counts were waived. Writ dated August 15, 1913.

In the Superior Court the case was tried before *Irwin, J.* The evidence is described in the opinion. It was stated in the bill of exceptions that, after about a week of the existence of the first lease to the plaintiff, the dumb-waiter "was used exclusively by the plaintiff and those occupying under her and those having occasion to send up and take down material on the dumb-waiter to and from the apartment of the plaintiff." There was evidence that one McSweeney was the janitor of this building, as well as of other buildings, that he "tended the heating apparatus which furnished heat to the various apartments, took off ashes and garbage placed on the waiter by the plaintiff and lowered sometimes by the plaintiff, sometimes by himself, and sent up ice, milk and groceries left in the basement for the plaintiff. He testified that the milk and groceries usually were left in boxes or compartments allotted to the different tenants in the entrance to the basement and that when he came round, usually about five o'clock in the afternoon, he sent the plaintiff's up on the waiter." There also was evidence that "Grocery men, provision men and others were accustomed also to use the dumb-waiter, but solely in connection with the plaintiff's apartment."

At the close of the evidence the defendants asked the judge to make various rulings, among which were the following:

"1. On all the evidence the plaintiff cannot recover.

"2. The plaintiff is not entitled to recover under the first count."

"4. The plaintiff is not entitled to recover under the third count."

The judge refused to make these rulings and submitted the case to the jury on the first and third counts. The jury returned a verdict for the plaintiff against both defendants personally in the sum of \$500; and the defendants alleged exceptions.

C. S. Knowles, for the defendants.

J. E. Macy, for the plaintiff.

PIERCE, J. Under an indenture bearing date September 19, 1912, the plaintiff as lessee took possession of the premises described, and covenanted to pay the rent reserved and to keep and perform all agreements therein contained. The lease was executed by A. J. Pendleton as lessor, and by the plaintiff, Nora M. Green, as lessee. It ran for a term of one year from its date.

The premises described in the lease consisted of "Four Rooms and Bath on Second floor in the Private House numbered 1880 Beacon Street, furnished." The lease contained no covenant in reference to the making of repairs. A dumb-waiter ran from the basement to the second floor, with an opening into the apartments on the first and second floors. There were no stairs leading from the apartment on the second floor to the basement or to the back part of the building in question, although there was communication by speaking tubes and electric appliances. The dumb-waiter was used to take up ice, milk, groceries and other articles left in the basement for the use of the tenants, and was also used by the occupants of the apartment to send down to the basement ashes, garbage and such other things as could be removed in that manner.

The opening to the dumb-waiter from the apartment on the first floor was closed soon after the plaintiff took possession of her apartment under the lease, and thereafter, during the entire period of her occupancy, the dumb-waiter was used exclusively by the plaintiff or persons acting with her permission or by her direction. In form and construction the dumb-waiter presented no unusual feature; it was simple in its construction and no skill was required in its operation. It ran in a sheathed shaft, the dimensions of which are not given, but sufficiently greater than those of the waiter to permit of "considerable play both sidewise and back and forth" between the sides of the waiter and the sides of the shaft. A rope attached to crossbars at the top of the dumb-waiter, ran from the crossbars over a large pulley at the top of the shaft, thence through a hole in the boarding to a counter weight which moved up or down, as the waiter was raised or lowered, between the permanent structure of the building and the sheathing forming the side of the shaft. The whole function of

the counter weight was to balance the weight of the dumb-waiter. The dumb-waiter was raised by pulling down upon a rope which ran from the basement over two pulleys at the head of the shaft at the opening into the plaintiff's apartment. A rope attached to the bottom of the dumb-waiter extended to the basement, and a person in the basement could operate the elevator up or down at will by pulling one or the other of these two ropes.

On January 11, 1913, Pendleton and the plaintiff cancelled the lease of September 19, 1912, and executed a second lease for a term of three years beginning September 23, 1912, with covenants in all respects like those contained in the first lease.

On or about May 31, 1913, as the plaintiff was using the dumb-waiter, it dropped and caught her hands and wrists, and fell down the shaft after their release. There was no direct evidence that the fall was due to any specific, defined cause, nor was there any reason to infer a defective condition of the waiter or of its appliances, apart from the fact that it fell in the manner in which it did.

Speculating, it may be said that the rope attached to the counter weight broke, but there was no evidence that such was the fact; or it may be surmised that the rope came off the large pulley and thus permitted the waiter, released of its counter balance, to fall. With equal force it may be argued that its fall was attributable to the method adopted of lowering it by the janitor or some other unknown person.

There is no evidence that at the time of the execution of the new lease there was anything dangerous or defective about the condition or construction of the dumb-waiter or of its appliances that was hidden to the plaintiff or to reasonable observation.

With the execution of the new lease the plaintiff became entitled to the exclusive enjoyment and control of the use of the dumb-waiter, and the lessor no longer was required to inspect it or to keep it in repair. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472.

The plaintiff contended that the evidence warranted the jury in finding that the title of her lessor was a "sham;" that the real title was in the defendants as trustees, and that the accident justified a finding that it was due to the act of a servant of the trustees in pulling down the waiter without warning.

If it were true that the defendants, as trustees, were the real landlords of the plaintiff, notwithstanding the form of the indenture, it nevertheless remains, that there was no evidence sufficient to warrant the jury in finding that the cause of the accident was the negligent act of a servant of the trustees in pulling down the waiter without warning.

If by reason of estoppel the plaintiff cannot deny the title of her lessor or of those under whom she claims, then the defendant Hammond cannot be held liable upon either count of the declaration for defects in the condition of the waiter or for failure to keep it in repair, because, having leased the entire premises to the defendant Pendleton, he ceased with the execution of the lease to have control over any part thereof. *Lindsey v. Leighton*, 150 Mass. 285. *Marley v. Wheelwright*, 172 Mass. 530.

There was evidence to warrant a finding of the plaintiff's due care.

The defendants' requests for a ruling that "the plaintiff is not entitled to recover under the first count" and for a ruling that "the plaintiff is not entitled to recover under the third count" should have been given.

The exceptions are sustained and judgment is to be entered for the defendants under St. 1909, c. 236.

So ordered.

ELIZABETH M. MCCOY & others vs. INHABITANTS OF NATICK.

Middlesex. January 13, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Trust, Construction, Administration.

A testator by his will gave the rest and residue of his estate to his sister for life with a power of disposal during her lifetime and directed that, after her death, "the balance" undisposed of by her should be held by the town of his residence in trust to use the income for the preservation of a monument at his grave and for the care and beautifying of his lot in the cemetery, with a direction that the town should not expend more than four per cent a year for such purposes. The testator owned no lot in a cemetery at the time of his death but was buried in a lot owned by his sister, for the perpetual care of which she had paid to the proprietor of the cemetery the sum of \$55. The amount usually left in trust for

the perpetual care of a lot in that cemetery was \$100. At the death of the sister, "the balance" undisposed of included several parcels of land. At a time when there had accumulated in money in the possession of the town under the trust the sum of \$677, the heirs at law of the testator and those claiming under the will of the sister brought a bill in equity seeking to have the lands in the possession of the town as trustee conveyed to them on the ground that the other funds held by the trustee were ample for the performance of the trust. *Held*, that the trustee in the performance of the trust was not controlled by the standard adopted in the care of the lots in the same cemetery, and therefore that the bill must be dismissed.

It was intimated that, if the average net income in a series of years should exceed four per cent upon the principal, a question fairly might be raised as to the disposition of the surplus.

And also that a like question fairly might be raised if it should prove impossible reasonably to expend the income in the manner provided by the trust without waste.

BILL IN EQUITY, filed in the Superior Court on December 7, 1914, and afterwards amended, by the heirs at law of Collins Morse, late of Natick, and those claiming under the will of Louisa M. Rockwood, who was given by the will of Collins Morse the estate described in the opinion, against the town of Natick, alleging that, by the operation of the clause in the will of Collins Morse described in the opinion, there had come into the possession of the defendant in trust, besides over \$600 in money, certain lands and buildings which were unnecessary for the purposes of the trust, and praying that such lands and buildings be conveyed to the plaintiffs.

The facts were agreed upon by the parties, and included among others the following:

Collins Morse never owned a lot in any cemetery. He was buried in a lot, which was owned by Louisa M. Rockwood, in Dell Park Cemetery in Natick. That cemetery was owned by Dell Park Cemetery Association, a corporation. Upon the lot was a stone monument, four stone markers and four corner stones. The amount usually left in trust for the perpetual care of a lot in Dell Park Cemetery was \$100.

There was in the possession of the defendant, as trustee under the paragraph of the will of Collins Morse quoted in the opinion, and kept by it on deposit in a savings bank, \$677.90. The cemetery association also had received from Louisa M. Rockwood \$55 for the perpetual care of her lot. "The income from such funds will be ample for the care of this lot in a suitable manner in conform-

ity to the rest of the cemetery and also for the care and replacement of the stones and monument on said lot whenever needed."

Under the quoted paragraph of the will the defendant also received and held four different parcels of land and one half interest in two others.

The case was reported by *Morton, J.*, to this court for determination upon the pleadings and the agreed facts.

W. R. Bigelow, for the plaintiffs.

F. B. Burns, (*C. J. F. O'Brien* with him,) for the defendant.

PIERCE, J. Collins Morse by his last will devised and bequeathed to his sister, Louisa M. Rockwood, after certain bequests, the rest and residue of his estate with power to "sell and dispose of so much . . . as will ensure her a comfortable living." At her decease, he gave "the balance" undisposed of to the town of Natick "but in trust nevertheless the income of which is to be used for the preservation of the monument which my executor is hereby authorized to erect at my grave and for the care and beautifying of my lot in the cemetery. . . . The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay." The validity and construction of the bequest to the town of Natick was considered by this court in *Morse v. Natick*, 176 Mass. 510. It was there held, that the gift to the town created under our statutes a good perpetual trust.

In reference to the provision in the will as to the sum to be expended, *Morton, J.*, said: "The direction that not more than four per cent per annum shall be expended by the town refers, we think, to income to an amount not exceeding four per cent on the principal. The gift is, in the first instance, of the whole income, to be used for the purposes named, and it is hardly to be supposed, we think, that the testator could have intended, by the direction referred to, to limit the expenditure to the trifling amount of four per cent of it. There is nothing to show that the income has been or is, or probably will be, more than that, or that there has been or will be any accumulation. Indeed, it may be fairly assumed that it is not probable that the town will realize more than four per cent from the trust fund."

So far as the record shows, events have justified the prediction that the percentage of income received would not exceed four per

cent of the principal. To be sure, there appears to be in possession of the town of Natick on deposit in the Natick Savings Bank the sum of \$677.90, and interest thereon from November 1, 1914, at four and one half per cent. Assuming that this sum represents unexpended income, no facts are reported from which it can be determined when, or how, or from what source it was amassed, nor whether, during the time of its collection, the direction of the trust as to the amount to be expended by the trustee has been fully obeyed.

The will furnishes in explicit terms a guiding and authoritative instruction to the trustee. It contains neither statement nor inference that the measure of the trustee's duty is adoption of or conformity to such a standard of taste and sentiment as shall from time to time be presented to view in the care, maintenance and beautification of other burial lots in this particular cemetery.

Should the average net income in a series of years exceed four per cent upon the principal, or should it prove impossible reasonably to expend the income in the manner provided by the trust without waste, a question might fairly be raised as to the disposition of any surplus, within principles recognized in *Sears v. Hardy*, 120 Mass. 524, *Teele v. Bishop of Derry*, 168 Mass. 341.

No such question is now before us and a decree should be entered dismissing the bill with costs.

Decree accordingly.

NATHAN LEWENSTEIN vs. FANNY FORMAN & others.

SAME vs. HYMAN FORMAN.

Suffolk. January 21, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Equity Pleading and Practice*, Amendment from equity to law, Costs. *Bills and Notes*, Whether joint or joint and several.

The interest under an insurance policy of one insured by a contract of fire insurance on a building in the Massachusetts standard form, after the destruction of the building by fire but before the insurance company has elected whether it will pay the loss or will rebuild the building, is property which can be reached and applied in a suit in equity under R. L. c. 159, § 3, cl. 7, in satisfaction of a debt of the insured.

The provisions of R. L. c. 173, § 52, empowering the Supreme Judicial Court or the Superior Court to allow amendments changing a suit in equity into an action at law or an action at law into a suit in equity "upon terms," do not require that, in granting such a motion, costs shall be imposed upon the moving party, but the imposition of costs still is left, under R. L. c. 203, § 14, and Equity Rules 12 and 21, within the discretion of the court and such an amendment may be allowed without costs.

Under R. L. c. 73, § 34, cl. 7, where a promissory note contains the words, "I [with the word 'We' written above it] promise to pay," and is signed by two persons, they are jointly and severally liable thereon.

The payee of a joint and several promissory note at the same time may pursue his remedy against one of the joint makers in equity and against the other at law.

CARROLL, J. The plaintiff brought a bill in equity against Fanny Forman, Hyman Forman and the Germania Fire Insurance Company. To this the defendants demurred and the demurrer was sustained; thereupon the plaintiff moved to strike out the paragraphs in the bill relating to Hyman Forman, and also moved to change the suit in equity against him into an action at law. These motions were allowed.* To this the defendants objected, contending that the note in suit was a joint note, that the makers thereof could not be severally sued, and that the amendments could not be allowed except upon the payment of terms. The defendants filed a bill of exceptions and also claimed an appeal. To the amended bill in equity against Fanny Forman, she demurred and also filed a plea in abatement, and, at the hearing on the appeal and demurrer, filed requests for rulings. The demurrer and plea were overruled and the requests were refused,† to all of which rulings of the court the defendant excepted. She also appealed. In the action at law against Hyman Forman, he filed a plea in abatement and made certain requests for rulings when the plea was heard. These requests were refused and the plea in abatement was overruled,† to which the defendant excepted. The judge,‡ being of opinion that the interlocutory decree and orders so affected the merits of the controversy that the matters ought to be finally determined, reported the case to this court.

1. The suit in equity is one to reach and apply the interest of Fanny Forman in a policy of fire insurance in the Massachusetts standard form on buildings owned by her, one of which was destroyed by fire. R. L. c. 159, § 3, cl. 7. The principal question in

* By Morton, J.

† By Wait, J.

‡ Wait, J.

dispute is whether the defendant's interest in the policy can be held under the above statute, she contending that the insurance company has a right to elect either to pay the loss or to rebuild, and as it has not yet exercised this election, she has no "property, right, title or interest" which can be reached and applied in payment of the debt.

The statute gives a creditor the right to reach and apply any property of the debtor "which cannot be reached to be attached or taken on execution in an action at law, although" it "cannot be reached and applied until a future time."

The right and title which Mrs. Forman has in the policy of insurance is property within the meaning of the statute. In *Alexander v. McPeck*, 189 Mass. 34, the same question was raised as in this case as to the share of the debtor in a fund which was payable to him on the death of his mother, provided he survived her, and, if he did not, to his issue living at the time of her death, and, in default of issue then living, to his legal representatives also as to his interest in another fund, the income of which was payable to him for life and at his death, in default of issue, to his legal representatives, and it was held that notwithstanding the various contingencies, his right in the first fund, if he survived his mother, and if he did not so survive her, his right to have the fund administered as a part of his estate in default of issue and the interest which he had in the second fund, (entirely apart from his right to the income while he lived,) to have it paid over to his executors and administrators as a part of his estate, if he left no issue living, were property, and could be reached under the statute, in payment of his debts, and Hammond, J., in delivering the opinion of the court, reviewed the history of the statute, and said: "We are of opinion that the statute should be broadly construed and that if the value of either of these rights can be ascertained either by sale or appraisal, it is within the statute." See also *Clark v. Fay*, 205 Mass. 228, where the cases are reviewed and a "vested interest in a contingent" right is held to be within the statute, while a mere possibility is not. See also *Merrill v. Colonial Mutual Fire Ins. Co.* 169 Mass. 10; *Whiting v. Burkhardt*, 178 Mass. 535.

The Germania Insurance Company was not chargeable at law as the trustee of Mrs. Forman. It did not have in its possession money or property belonging to her absolutely and without any

contingency. *Godfrey v. Macomber*, 128 Mass. 188. The insurance company, therefore, having in its possession property of the female defendant which could not be attached at law, the fund can be reached in equity under R. L. c. 159, § 3, cl. 7.

2. The defendant contends that the amendment and motions in the original suit were improperly allowed, because terms were not imposed on the plaintiff. The court had undoubtedly the right to grant the motions and allow the amendment without requiring the payment of costs. Costs in equity are within the discretion of the court. R. L. c. 203, § 14. Equity Rules 12, 21.

3. Over an "I" in the note of the defendants to the plaintiff, is the word "We," so that the note reads: "On demand after date ^{We}_I promise to pay," the defendant argues the note was a joint, and not a joint and several note, and the defendants must be joined. In a promissory note containing the words "I promise to pay," signed by two or more persons, they are deemed to be jointly and severally liable therefor. R. L. c. 73, § 34, cl. 7. The instrument is not only a promise jointly; it is the promise of each severally. It contains not only the words "I promise," but the words "We promise" as well. Where the agreement was, "we, or either of us, promise," it was held to be a joint and several obligation. *Monk v. Beal*, 2 Allen, 585. The words, "we, or either of us, promise," in a promissory note were held to create a joint and several promise. *Pogue v. Clark*, 25 Ill. 333. Separate proceedings, therefore, could be brought against each of the makers, and there was no error in the rulings of the court.

4. The plaintiff can pursue his remedy in equity against one defendant and in law against another. There is nothing in *Sandford v. Wright*, 164 Mass. 85, in conflict with what is herein stated.

We have considered all the exceptions on which the defendants now rely.

In the action at law the defendant's exceptions are overruled, in the suit in equity the interlocutory decrees are affirmed and the exceptions overruled.

So ordered.

The cases were submitted on briefs.

N. Barnett, for the defendants.

S. Sigilman, for the plaintiff.

LYDIA A. GILBERT vs. THOMAS C. BACHELDER, executor.

Suffolk. January 13, 14, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Devise and Legacy, Whether payment postponed. Interest.

The mere fact that a testator by his will devised all his real estate to trustees with directions that they should pay the net income therefrom to the executor of his will at intervals six months apart, and that they should sell and dispose of the real estate "as speedily and quickly as they" could "economically and reasonably do so," and pay the net proceeds of the sales to the executor, and that the executor out of the personal property and the sums thus received from the trustees should pay certain legacies, but that the real estate in no event should be sold to pay the legacies except by the trustees as above provided, does not disclose an intention of the testator to postpone the payments of the legacies more than one year from his death.

And therefore one, who was given a legacy by such a will and whose entire legacy was not paid for more than a year after the testator's death although the value of the estate warranted a payment within the year, is entitled to be paid interest at six per cent on any unpaid balances from the expiration of one year from the testator's death.

CONTRACT against the executor of the will of Charles H. Greenwood, late of Boston, for interest alleged to be due to the plaintiff by reason of a delay beyond a year in the payment of a legacy. Writ dated August 25, 1915.

By the first paragraph of the will of Charles H. Greenwood all his real estate was given to Thomas C. Bachelder and Charles Ripley in trust in their discretion to manage, maintain and develop it and to collect the revenue from it; to "pay over the net receipts at intervals of not more than six months apart to the executor of this will hereinafter named and his receipt for such payments shall be a full and complete discharge to my trustees;" to sell and dispose of all the real estate, with an exception not material, "as speedily and quickly as they can economically and reasonably do so," the trustees being given "full, absolute, and final" discretion in all matters appertaining thereto, and being directed "likewise" to pay over to the executor "any such monies so received, in the manner" provided in the passage above quoted as to "net receipts."

In the second paragraph Thomas C. Bachelder was named sole executor and was directed "to pay over out of my personal property and the sums received from profits and sales of my real estate as above provided the following bequests and legacies as soon as he can conveniently do so, but under no circumstances and in no event shall my real estate be sold to pay these bequests and legacies except by my two said trustees in manner as above provided." There then followed a list of bequests including, among others, the eighth, quoted in the opinion.

There was an agreed statement of facts, from which it appeared that the inventory of the intestate's estate showed \$187,020 of real estate and \$112,426.43 of personal estate; that the gifts provided for in the will amounted to \$178,000; that at the date of the writ in this action the executor had received \$154,595.81 from the personal property of the estate and from the trustees, and that this had accumulated as a fund to use for the payment of the legacies. A part of this fund the executor was obliged to use to pay legacy taxes, payments upon mortgage notes and expenses of administration. Before this action was begun the plaintiff had been paid all the principal of her legacy. At "the time of the payment of the principal sum of the legacy and at the date of the writ, the defendant had in his hands sufficient funds remaining unpaid out of the fund" paid him by the trustees "to pay the interest on the plaintiff's legacy." If the plaintiff was entitled to recover interest, judgment should be entered for her in the sum of \$233.46 with interest from August 25, 1915.

The case was heard upon the agreed statement of facts by Jenney, J., who found for the plaintiff in the sum of \$237.93 and ordered judgment forthwith. The defendant appealed.

T. C. Bachelder, pro se.

G. F. Wales, for the plaintiff.

PIERCE, J. It is the contention of the defendant, that under the scheme of the will the plaintiff as a *cestui que trust* took an interest to the extent of \$12,000 in a fund to be developed and accumulated from the executor's investment of personal property and from the trustees' management and sale of the real estate. He also argues, that her right to receive payment did not accrue at the expiration of one year from the day of the testator's death, but, by necessary implication, was postponed until the executor had acquired a

fund sufficient to pay in full the gift to her and to all others similarly conditioned.

In that part of the will which creates and defines the trust, as also the duties of the trustees, no word can be found to indicate that the testator intended that there should be at any time a payment of trust income or principal directly to any beneficiary other than to the executor of the will. That such was not the intention of the testator is made certain by the provision in the trust which directs the trustees "To transfer by proper deed or deeds such an amount of land to the three trustees of the Greenwood Memorial Building hereinafter named as said three trustees shall decide and determine to be proper and necessary."

The clause of the will under which the plaintiff claims, is as follows: "Eighth. To Lydia A. Gilbert twelve thousand dollars (12,000) and to her sister, Josephine Gilbert, eight thousand dollars (8,000) if they shall be living at my decease. If one of them be then living the entire sum of twenty thousand dollars shall be paid that one then living. If neither be then living these legacies lapse."

This clause creates an ordinary pecuniary legacy payable at the expiration of one year from the testator's death, and we find nothing in the other clauses of the will to indicate that such a construction is inconsistent with any express or implied intention of the testator. In all essential respects this case is not to be distinguished from *Clafin v. Holmes*, 202 Mass. 157.

It follows that interest by way of accretion is to be added to that portion of the legacy that remained unpaid at the expiration of one year from the testator's death.

By agreement of parties, judgment in the above event is to be entered for the plaintiff for \$233.46, and interest thereon from August 25, 1915, to the date of the entry of judgment.

And it is

So ordered.

MARGARET E. DOODY vs. JOSEPH P. COLLINS.

Suffolk. January 14, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Lien, For storage and care of motor vehicle. *Garage. Automobile. Replevin. Estoppel.*

If one, in whose name the owner of an automobile had permitted the automobile to be registered, without the owner's knowledge or consent leaves the automobile in a public garage, and thereafter, learning these facts, the owner writes to the proprietor of the garage a letter notifying him to "hold the car subject to" the owner's "disposal," stating, "The storage etc.," the person who left the car there "contracted and will have to pay," and directing that "under no conditions should" that person be allowed to take the car from the garage excepting under instructions in writing from the owner, thereafter, under St. 1913, c. 300, § 1, the proprietor of the garage has a lien on the automobile for proper charges for storage and care.

And therefore the owner is not entitled to take the automobile from the garage by virtue of a writ of replevin which he sued out without paying or tendering to the proprietor of the garage his proper charges, if the proprietor did nothing to estop him from contending either that he had a lien or that the owner had made no sufficient tender.

And the mere fact, that the proprietor of the garage "at the time of replevin" claims and demands payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, does not estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender.

REPLEVIN of an automobile. Writ in the Municipal Court of the City of Boston dated April 24, 1915.

In the Municipal Court the presiding judge found for the plaintiff, and, at the request of the defendant, reported the case to the Appellate Division. His report stated the following facts among others:

The automobile in question was owned by the plaintiff, but, with the consent of the plaintiff, was registered in the name of one Sewell. On or about October 4, 1914, Sewell with the plaintiff's permission took the automobile on a personal errand to Canton. Late in the day he rode into the defendant's garage in Boston and stated that he was the owner of the automobile and that he desired to store it. After the defendant had stated his

terms for storage, Sewell said that he would leave it "a few days." He did not give the defendant any information as to the true facts regarding the ownership of the automobile and never communicated with the defendant thereafter.

The plaintiff asked Sewell about the automobile frequently but did not learn of its whereabouts until in February, 1915.

The plaintiff for the first time communicated with the defendant on February 24, 1915, when, with her approval, a letter was written to the defendant stating that the automobile was hers and was "registered in the name of John M. Sewell simply because it would have been an inconvenience for" her "to register it in her own name." The letter continued: "We wish to notify you to hold the car subject to our disposal. The storage etc., Mr. Sewell contracted and will have to pay. Under no conditions should Mr. Sewell be allowed to take the car from your garage unless you receive written instructions from us."

The report continued as follows:

"Nothing further was done by either party until the time of replevying.

"At the time of replevin the defendant claimed and demanded payment of a storage lien up to May 4, 1915, which would be the end of an even seven months from October 4, 1914, of \$105. This report contains all the evidence material to the questions reported."

The judge also found, "that the plaintiff's conduct as to Sewell's use and control of the automobile was not known to the defendant."

Other material facts are stated in the opinion. The Appellate Division ordered judgment for the defendant; and the plaintiff appealed.

F. R. Mullin, (P. F. Spain with him,) for the plaintiff.

E. P. Benjamin, for the defendant, submitted a brief.

PIERCE, J. The defendant, in possession of an automobile to which the plaintiff had the right to immediate possession on February 24, 1915, received a letter from the plaintiff the material part of which read, "We wish to notify you to hold the car subject to our disposal. The storage etc., Mr. Sewell contracted and will have to pay. Under no conditions should Mr. Sewell be allowed to take the car from your garage unless you receive written

instructions from us." Thereafter, by virtue of St. 1913, c. 300, § 1, the defendant had a lien on the automobile for proper charges for storage and care. On April 24, 1915, without demand for possession, without recognition of the defendant's right to assert any lien, and before tender of any sum in payment of defendant's probable charges for the storage and care of the automobile, the plaintiff sued out his writ of replevin.

The report of the judge of the Municipal Court states, "At the time of replevin, the defendant claimed and demanded payment of a storage lien up to May 4, 1915, which would be the end of an even seven months from October 4, 1914, of \$105."

The defendant requested the judge to rule, "Upon all the evidence the defendant is entitled to a finding."

As the defendant had a lien under the statute for the period between February 24, 1915, and April 24, 1915, the plaintiff was not entitled to possession of the automobile as against the defendant's claim of lien, without proof of prior payment of the proper charges, of tender of payment thereof to the defendant and of his refusal to receive the same, or such other conduct on the part of the defendant as estopped him to contend either that he had a lien or that the plaintiff had made no sufficient tender. *Gilmore v. Holt*, 4 Pick. 258. *Williams v. Patrick*, 177 Mass. 160.

The right to maintain replevin of a chattel is predicated upon the plaintiff's general or special title and upon his right to immediate possession as against the defendant in the replevin writ at the time of the issuance of the writ. *Johnson v. Neale*, 6 Allen, 227. *Fowler v. Parsons*, 143 Mass. 401. *Field v. Fletcher*, 191 Mass. 494.

Therefore, we need not discuss whether the demand of the defendant, made at "the time of replevin," for a sum in excess of his legal claim, amounted to a conversion or whether a tender must have been made. Compare *Hamilton v. McLoughlin*, 145 Mass. 20; *Folsom v. Barrett*, 180 Mass. 439.

Judgment for the defendant affirmed.

MICHAEL LYNCH vs. C. J. LARIVEE LUMBER COMPANY.

Suffolk. January 14, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Employer's liability. *Evidence*, Opinion: experts, Photographs, Deposition. *Practice*, *Civil*, Conduct of trial.

Where, before the workmen's compensation act went into effect, an employee of the proprietor of a lumber yard was injured by the falling upon him of a temporary lumber pile as he was assisting in loading a plank from the pile to a wagon, he cannot recover for his injuries in an action against his employer under the employers' liability act based upon alleged negligence of a superintendent, who was the defendant's yard foreman and who a few days before the accident had ordered the pile placed where it was, if it appears that the superintendent was not present when the plaintiff was injured and there is no evidence that he was present when the lumber was piled, nor that he directed the piling, nor that he selected for the work other than competent and experienced men, nor that he knew that the pile when completed was unsafe or knew or should have known that it probably would become unstable and dangerous from any cause other than interference with the support one plank afforded to the other, nor that he directed the removal of the plank nor that it was his duty as yard foreman to superintend the performance of such work.

In the case above described, it appeared that the plaintiff was a teamster of sixteen years' experience in the defendant's yard, that he was assisting in the loading of the plank at the direction of a "tallyman," so called, whose duty, upon receiving orders on slips of paper from the defendant's office, was to procure from the superintendent men to assist in loading on teams the lumber called for on the order as he should find it, he having charge of the loading of the teams and the men being under a duty to obey him; but there was no evidence that the tallyman had any knowledge of the manner in which the pile which fell had been built or of its condition as to safety beyond what was apparent to the observation of the plaintiff and his experienced co-workers. *Held*, that there was no evidence that the accident was attributable to any act or default of the tallyman in connection with any matter over which he had or had assumed to have power of superintendence.

A workman in a lumber yard cannot recover in an action at common law against his employer for injuries, received by him, while loading lumber from a pile to a wagon, before the workmen's compensation act went into effect, and caused by improper construction of the pile, if it appears that the piling was done by his fellow servants.

It is a proper exercise of discretion by a judge presiding at the trial of an action for personal injuries due to the falling of a temporary pile of lumber alleged to have been caused by its improper construction, to exclude expert testimony upon the question of the proper piling of the pile, the subject requiring no peculiar learning or experience and being one upon which the jury can have no dif-

ficulty in forming an opinion for themselves as to the likelihood of the pile to fall and injure a person near it.

It is improper for a judge presiding at a trial of an action for personal injuries caused by the fall of a pile of lumber to admit in evidence unverified photographs of piles of lumber, if they are not received as chalks and it is not contended that they represent actual conditions as they existed at the time of the accident.

Where, after the plaintiff has rested at the trial of an action at common law, the defendant also rests without having introduced any evidence and without offering in evidence a deposition of a witness, which had been taken at his request and by consent of parties under Rule 35 of the Superior Court two days before the trial of the action, copies having been submitted to the counsel for both parties but the original not having been filed with the clerk of the court as required by Rule 36, it is proper for the presiding judge to refuse to permit the plaintiff to introduce the deposition in evidence.

TORT for personal injuries received by the plaintiff while in the defendant's employ on October 10, 1911. Writ dated December 15, 1911.

In the Superior Court the case was tried before *Hall, J.* The declaration and the material evidence and exceptions are described in the opinion. In regard to the deposition of Hanify, mentioned in the opinion, the record stated as follows in substance: The case had been specially assigned for a trial on May 19, 1913. On Thursday, May 15, on request of the counsel for the defendant, the counsel for the plaintiff agreed to go to Salem Hospital on Saturday for the purpose of taking the deposition of Hanify. This was done on May 17 by agreement, both counsel receiving a copy of the testimony. On May 19, when the case came up for trial, there had been struck off on the typewriter by a member of the law firm who represented the defendant at the taking of the deposition, three copies of the statement of the witness, one of which had been sent to the plaintiff's counsel, and two sent to the defendant's counsel. Neither one of these copies had been filed, although all three were in court in the possession of the respective counsel. Upon the completion of the plaintiff's case, the defendant having rested his case, and the testimony of Hanify not being offered by the defendant, the plaintiff asked that the evidence be admitted under Rule 35 of the Superior Court as a deposition taken in behalf of the defendant. The deposition was excluded; and the plaintiff excepted. At the close of the evidence, by agreement of all parties the judge ordered a verdict for the defendant and reported the case to this court with the understand-

ing that, if the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$1,250; otherwise judgment was to be entered for the defendant.

G. P. Beckford, for the plaintiff.

G. C. Dickson & C. S. Knowles, for the defendant, submitted a brief.

PIERCE, J. The plaintiff was an employee of the defendant, and at the time of his injury was engaged with some fellow employees in taking planks from a pile in the defendant's lumber yard. The pile was four or five feet high and five tiers wide. It was made up of 2×8 and 4×6 timbers, twenty-eight or thirty feet long, not tied. It was thrown by the side of the roadway temporarily, waiting for orders, "certain lengths to be picked out of it, . . . piled up for a matter of two or three days," and "not put there for a permanent pile at all."

The plaintiff testified: "The custom of piling piles in the driveway 'on orders' has existed on the wharf of this company from the time I went to work there down to the present time," sixteen years; that he was a teamster and not a piler; that he had taken lumber off of the piles and also, while testifying as to the propriety and safety of putting timber up, that "The higher up they are the more care should be observed in the putting in of the sticks, and if I had a pile of planks 2×8 lying on the ground up 16 planks thick, that would be safe enough." There is no better way of finding out whether a pile is secure or not than to go right up and take hold of it. "There is a sort of feeling when you take hold and shake the pile that shows when it is secure." As to the circumstances attending his injury he testified: "I had my team loaded in what they call No. 3 driveway and tried to get out, but there was one of the other teams blocking the driveway so I couldn't get out, and when I see I couldn't get out, why, I got off the wagon and, as it is always customary to do, started to help the teamster. As I stopped my team and got off and went up to the pile the man in charge of the job, Mr. Hanify — they were just ready to raise a stick at the time — he said 'Come on, Lynch,' 'break it,' so I stepped in to break it. I got down off the team and walked toward the pile, just walking about thirty feet, you might as well say, got off my team and walked up for to help to load the wagon, and when Hanify told me to break it I stepped

in for to break it and it came over on me. The breaker is what we call the pivot. There are either a man or two men on each end of the stick, and when they raise the stick the man that is called the pivot or breaker generally steps in and they place it on his shoulder, and he swings it around, the man on front end lets go and the men on the back end bears down, and you swing around, and place the forward end on the wagon. The breaker stands, I should judge about the middle of the pile and when Hanify told me to break it down, I walked in alongside of the pile for to get it on my shoulder and the pile came over on to me. It hit me in the ankle and knocked me down and broke my ankle. The stick had not left the hands of the men who were to place it on my shoulder and I had done nothing after leaving my team and walking toward the pile except when receiving that direction stood about opposite the centre of the pile. Hanify is the man in charge of the job, in charge of loading the wagon. He was tallying and directing the men what sticks to put on the wagon. He always held the same position and he always did the same work. I stood right up close to the pile. I had not noticed what kind of a pile or how it was piled. I did not know that when they lifted this stick the pile was likely to fall over on me, if I did I would not be there."

The plaintiff's declaration is in three counts, two under the employers' liability act, R. L. c. 106, § 71, cl. 1, 2, and one at common law. Count 1 alleges as the cause of the plaintiff's injury "the negligence of the defendant or of a person in the employ of the defendant exercising superintendence and whose sole or principal duty was superintendence in failing to warn the plaintiff of the dangerous condition of a certain pile of lumber to which the plaintiff had been sent to work." Count 2 alleges that the plaintiff "was injured owing to a defect in the ways works and machinery used in the business of the defendant which arose from the negligence of a person in the employ of the defendant exercising superintendence whose sole or principal duty was that of superintendence to wit, the careless piling of a pile of lumber." Count 3 that the plaintiff "was injured owing to the negligence of the defendant in permitting said pile to be in a dangerous and unsafe condition which condition was unknown to the plaintiff but should have been known to the defendant." Each count alleges the due care of the plaintiff and, by amendment allowed by

consent, that "due notice of the time, place and cause of said injury was given the defendant."

One Brown testified: "I was foreman, yard foreman. . . . I took my orders from Parsons, the superintendent. These tallymen while they were working down in the yard would come to me for help to load their team. . . . A tallyman was necessarily a man who wrote a good hand and was fit for clerical work. I can't say how frequently they would help load teams, but when necessity demanded it. When we were unloading vessels it was necessary for them to take out lumber off the edge of the wharf as fast as it was demanded and pile it up. At that time we had a large number of men, from twenty to thirty; at other times about four or five steady men, when we were not unloading vessels, and teamsters besides, about half a dozen. Besides the yard men whatever teamsters there were under my charge when they were in the yard loading the wagons. Not only them but also when they were loading the wagons the tallymen were under my charge, and the tallymen were obliged to come to me for help when they needed help to load a wagon. The tallymen did various other things, worked in the dry house, sometimes cleaning up the shed, swept up the shed, something like that to keep busy under my orders and those of Mr. Parsons."

The jury would be warranted upon this testimony in finding Brown was a superintendent within the meaning of the act. Brown, who was not present at the time of the accident, had ordered the pile of timber from which the planks fell to be placed by the side of the roadway a few days before the day of the plaintiff's injury, but there is no evidence that he was present at the piling, that he directed the manner of piling, that he selected for the work other than experienced and competent men, that he knew that the pile as set up was in fact unsafe or knew or should have known that it probably would become unstable and dangerous from any cause other than interference with the support one plank afforded to the others. Nor is there any evidence that he directed the removal of the planks or that it was his duty as yard foreman to superintend the tallymen in the performance of such work.

Outside of the fact that a part of the pile fell at the moment of the removal of a single plank there is no evidence of the instability of the pile or that any unusual and hidden danger lurked in it.

What relation of support, if any, the plank last removed sustained to others, is pure conjecture as is the question whether its removal was not a negligent act of fellow servants.

The evidence does not warrant a finding of fact that the pile was unsafe by reason of any act or default of the superintendent, Brown, that he knew or should have known that it was unsafe for the plaintiff to work upon or about it. It follows that there was no duty of the superintendent that required him to warn the plaintiff of the danger attendant upon his work.

The tallyman, Hanify, who set the plaintiff at work, is not shown to have had knowledge of the manner of the original piling or of the condition of the pile as to safety beyond what was apparent to the observation of the plaintiff and to that of his experienced co-workers. Upon receiving orders on slips from the office it was the tallyman's duty to procure of the superintendent, Brown, men to assist in loading on teams the lumber that was called for on his order as he should find it. In doing this work the men were supposed to obey him and he had charge of the loading of the teams. There is no evidence that the accident was attributable to any act or default of Hanify in connection with any matter over which he had or had assumed to have power of superintendence.

That there can be no recovery upon the common law count is settled by *Regan v. Lombard*, 181 Mass. 329.

We do not find it necessary to determine whether the plaintiff was in the exercise of due care. See *Baldwin v. St. Louis, Keokuk & Northern Railway*, 68 Iowa, 37.

The presiding judge was clearly right in the exclusion of the proffered expert testimony upon the question of the proper piling of the pile, as the subject required no peculiar learning or experience and was one upon which the jury could have no difficulty in forming an opinion for themselves as to the liability of the pile to fall and injure a person who should be near it. *New England Glass Co. v. Lovell*, 7 Cush. 319. *Baldwin v. St. Louis, Keokuk & Northern Railway*, *supra*. *Whalen v. Rosnosky*, 195 Mass. 545.

The photographs were improperly admitted in evidence. They were not verified, they were not received as chalks, and there was no pretence that they represented actual conditions as they existed

at the time of the accident. *Blair v. Pelham*, 118 Mass. 240. *Everson v. Casualty Co. of America*, 208 Mass. 214.

The deposition was properly excluded in the discretion of the court; it had never been filed under Rule 36 of the Superior Court, and when it was offered both parties had rested. *Carriere v. Merrick Lumber Co.* 203 Mass. 322, 327.

It follows that evidence could not properly have been submitted to the jury, that the direction of a verdict for the defendant was rightly ordered and that now in accordance with the terms of the report judgment for the defendant should be entered. And it is

So ordered.

JAMES M. WATSON, administrator, vs. MARY E. WENZ, executrix.

Suffolk. January 18, 1916. — March 4, 1916.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Review, Writ of.

The granting or denial of a petition for a writ of review is a matter of discretion. On a petition for a writ of review no relief will be given from results that naturally followed negligence of the petitioner's counsel in the preparation or the trial of the petitioner's case in the Superior Court.

PIERCE, J. This is a petition for a writ of review. After a hearing on the merits, a single justice of this court * ordered that the petition be dismissed and, at the request of the petitioner, reported the case for determination by the full court.

It is the contention of the petitioner that he is now able to produce certain evidence material to the issue tried before the Superior Court, which could not be offered at the trial in that court because without fault he was ignorant of its existence. He also contends that his attorneys misconducted the trial in that they negligently or designedly failed to use the testimony of witnesses which had been received in whole or in part at the trial of the same issue in the Probate Court.

An examination of the affidavits and other parts of the peti-

* *Braley, J.*

tion discloses that the evidence was known to some of those persons whom the petitioner represented at the trial or could have been found by reasonable effort in season for use at the trial, or, if not then available, in time to present to the Superior Court on a motion for a new trial.

The scope of a writ of review would be unduly enlarged could it be used to give relief from results naturally following upon dilatory and negligent preparation or trial of causes. *Sylvester v. Hubley*, 157 Mass. 306. *Towne v. Newton*, 167 Mass. 311.

The granting or denying of a petition for review is a matter of discretion and the only question which we are called upon to determine is whether upon the facts reported that discretion was wrongly exercised as a matter of law. *Hayes v. Collins*, 114 Mass. 54. *Dearborn v. Mathes*, 128 Mass. 194, 196. *Winthrop v. Athol*, 216 Mass. 79. *Browne v. Fairhall*, 218 Mass. 495.

We are of the opinion it cannot be so determined.

Petition dismissed.

The case was submitted on briefs.

J. A. Watson, administrator, *pro se*.

S. C. Bennett & H. D. McLellan, for the respondent.

JOHN MCLEAN'S CASE.

Suffolk. January 18, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Notice, Filing claim.

Under the provision of St. 1911, c. 751, Part II, § 18, that a claim for compensation under the workmen's compensation act shall not be barred for want of notice "if it be shown that the association, subscriber or agent had knowledge of the injury," proof that the injured workman within three days from the time he received the injury gave oral notice of it to his foreman and that "a report of the injury to the employee was filed promptly by the subscriber," establishes knowledge of the subscriber which makes proof of notice unnecessary.

Ignorance by an injured workman of the requirement of St. 1911, c. 751, Part II, § 23, as added by St. 1912, c. 571, § 5, that a claim in writing for compensation shall be filed with the Industrial Accident Board within the six months prescribed by § 15, cannot be found to be a "mistake or other reasonable cause"

for the omission to file such a claim by one who had given oral notice of his injury to his foreman and a notice of it by letter to the insurer, in which he wrote, "If there is anything I should do please let me know as I don't know just what to do," and to which the insurer had answered, "You will, therefore, be obliged to present yourself at this office at an early date for the purpose of an examination" but did not mention any requirement as to filing a claim in writing with the Industrial Accident Board.

PIERCE, J. The evidence warranted the finding of the Industrial Accident Board that the employee, John McLean, received a personal injury which arose out of and in the course of his employment on December 12, 1914, by reason of which he was incapacitated totally for work until April 15, 1915, and partially until July 1, 1915; that as a result of conditions arising from his accident and consequent inability to work, he went to his home in Nova Scotia on December 15, 1914; that before going he told his foreman, McDonald, that he was hurt and that McDonald said, "Yes I heard you did;" ("The record shows that a report of the injury to the employee was filed promptly by the subscriber") that after arriving at Merland, Nova Scotia, the employee, on January 16, 1915, sent a letter to the insurer, the Contractors Mutual Liability Insurance Company, which reads, "I wish to inform you while working for Blair & Co on the Subway job at Scolly Sq. that I fell and injured my spine and have been unable to work since. The accident occurred on Dec. 12th 1914 at 3 P. M. I went to the relief Hospital on that day also to Dr. T. F. Goulding M.D. Hotel Commonwealth. I will see you on my return to Boston when I am able to work. If there is any thing I should do please let me know as I don't know just what to do. I came to Nova Scotia after getting hurt as I could board cheaper than in the city;" that upon the receipt of the employee's letter the insurer, on January 29, 1915, made answer as follows: "We have your letter of January 16th advising us that you are unable to work on account of your injury of December 12th, while in the employ of I. Blair & Co. Under the Massachusetts act, we are entitled to have any injured employe examined at any time at our request. You will, therefore, be obliged to present yourself at this office at an early date for the purpose of an examination, otherwise any claim for compensation will not be recognized, and cannot be sustained in our courts;" that the employee on February 19, 1915, by letter replied, "I have received your letter of the 29th.

I appreciate your kindness for letting me know. I have been waiting to see if I would get improve some. I wish to know, if I go up to Boston, to be examined, will it be necessary for me to remain up there, as I much prefer living down here in the country. I feel better contented down here than rooming out in Boston all alone, while I am unable to work;" that the employee returned to Boston on June 1, 1915; that no claim for compensation ever was filed with the Industrial Accident Board or otherwise than in the above letter to the insurer dated January 16, 1915.

Upon the foregoing facts the insurer asked the Industrial Accident Board to rule:

"1. That there can be no compensation allowed in this case as the claim was not made within six months of the date of the accident.

"2. That the failure to make a claim within the period of six months was not occasioned by mistake or other reasonable cause.

"3. That the refusal of the employee to submit himself for examination is ground for forfeiting his compensation."

It also argues upon its brief that, "The notice to the foreman, McDonald, was insufficient, as he was a fellow employee. He was not an agent exercising superintendence, nor was he such an officer or agent as could receive notice."

We shall consider the argument and requests in reverse order.

The workmen's compensation act (St. 1911, c. 751, Part II, §§ 15, 18) provides, "No proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the association or subscriber as soon as practicable after the happening thereof," provided (§ 18) that "Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury."

The situation as regards notice to the foreman McDonald would seem to be identical to that presented in *Bloom's Case*, 222 Mass. 434.

In addition to the notice to the foreman, the fact must be found that the foreman communicated the notice given to him, from the fact that a report of the injury to the employee was filed promptly by the subscriber. Thus the knowledge of the subscriber is established.

The finding of the board that the employee "did not refuse the examination" and "did not obstruct same" was amply warranted by the evidence.

Indeed, it would be difficult, if not impossible, to arrive at another conclusion in view of the correspondence and particularly in consideration of the insurer's failure to reply to the letter of the employee dated February 19, 1915.

St. 1911, c. 751, Part II, § 23, as added to the workmen's compensation act by St. 1912, c. 571, § 5, provides that "The claim for compensation shall be in writing and shall state the time, place, cause and nature of the injury; it shall be signed by the person injured or by a person in his behalf . . . and shall be filed with the Industrial Accident Board. The failure to make a claim within the period prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause."

A claim was not filed with the board within the time limited in § 15 or ever thereafter. The employee gives no reason and offers no excuse for his failure to present his claim.

The board's finding of mistake on the part of the employee because of the insurer's failure to reply to the letter of February 19, 1915, finds no warrant in the testimony of the employee. There is no evidence that he thought the letter would serve as notice to the insurer or as a claim to the Industrial Accident Board. Nor are other facts evidenced from which it could rightly be found that there existed other reasonable cause for not filing the claim.

Ignorance of the statute's requirement is the only inference to be drawn from the facts that the employee gave notice to his foreman, gave formal notice to the insurer and failed to file with the Industrial Accident Board a claim for compensation within the six months required by law.

Ignorance of the statutory requirement is not a mistake within the meaning of the above exception. See *Roles v. Pascall & Sons*, [1911] 1 K. B. 982; *Griffiths v. Atkinson*, [1912] W. C. R. 277.

The case is to be recommitted to the Industrial Accident Board, where the employee may move for a hearing and for the introduction of further evidence upon the question of "reasonable cause,"

other than mistake for not filing the claim. If such motion is made and granted, and upon further hearing new facts are shown upon this point, the case is to be considered anew, upon all the evidence introduced by all parties. Otherwise, the rulings requested numbered 1 and 2 should be given.

*Decree * reversed.*

So ordered.

J. F. Scannell, for the insurer.

T. L. Walsh & J. H. Walsh, Jr., for the employee, submitted a brief.

ERNEST J. LEMIEUX'S CASE.

Suffolk. January 18, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act.

There is nothing in St. 1911, c. 751, Part II, §§ 15, 23, as amended by St. 1912, c. 571, § 5, which requires that a claim for compensation under the workmen's compensation act shall state anything more than "the time, place, cause and nature of the injury;" and the particular results of the injury, which often cannot be anticipated, are not required to be stated.

An agreement under the workmen's compensation act between the insurer and an injured employee for specific additional compensation for twenty-five weeks for the loss of three fingers, and its approval by the Industrial Accident Board, are not a final determination that the injury to the employee consisted of the loss of three fingers and was not an injury to the hand rendering it incapable of use, and the injured employee, after the compensation under the agreement has been paid in full, still has the right to claim other additional compensation for a further period of twenty-five weeks under St. 1913, c. 445, § 1, as amended by St. 1914, c. 708, § 6 (e), for a hand "not lost but so injured as to be permanently incapable of use."

PIERCE, J. It is admitted that the employee was injured on July 7, 1913, and that he has received partial compensation and an additional compensation under the provisions of the workmen's compensation act, St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 445.

* Entered by order of *Wait, J.*, affirming the decision of the Industrial Accident Board.

The only question now presented is whether upon the facts the employee is entitled to receive a further twenty-five weeks' additional compensation for a hand "permanently incapable of use," under the provisions of St. 1913, c. 445, § 1, as amended by St. 1914, c. 708, § 6 (e).

On May 12, 1915, the Industrial Accident Board wrote to the Contractors Mutual Liability Insurance Company, "The board understands that this employee's compensation has been cut off since March 15, 1915, although he is incapacitated for work by reason of the injury and unable to obtain any work at which he can earn wages. The medical adviser has seen this employee and reports that in his opinion the injured hand is permanently incapable of use. This is shown by the X-ray and the hand itself. The board rules informally that the employee is entitled to additional compensation for a period of fifty weeks from the date of the injury and that compensation should be continued on the basis of total incapacity for work since March 15, 1915. We suggest that you file an agreement with the board covering the additional compensation due, and advise us, that in accordance with our suggestion, you are paying incapacity compensation." On May 14, 1915, the insurer replied to the board, "We have your favor of the 12th inst. with reference to this case, and beg to advise that we have already completed the payment to this man of twenty-five weeks' additional compensation for the loss of the fingers. Taking the position that the hand was not totally incapable of use, up to the present time there has been no claim of total incapacity of this hand, and if we are to understand that that claim is now made, it is a matter that will have to be determined at the hearing which is now set down for June 4th. It is not our desire to inconvenience the board in any way or take advantage of the injured man, but we have found it exceedingly difficult to deal with this man and his family, each and all having adopted an antagonistic attitude throughout our dealings, and practically telling us that there was no intention of endeavoring to better the injured man's position by seeking employment, which we feel sure he could avail himself of. We believe that the only solution of the problem will be a hearing, and we shall be pleased to abide by the findings of the committee."

Thereupon a hearing was had before the arbitration committee

upon the single question "whether the injury was such as to render the hand permanently incapable of use." The employee and the insurer were represented by counsel and, so far as appears, the hearing was held without objection. The committee found "upon all the evidence that the employee . . . received a personal injury . . . by reason of which his right hand was rendered permanently incapable of use."

This finding was affirmed by the Industrial Accident Board upon a review of the evidence, and was warranted by the visible external physical condition of what remained of a hand as also by the internal loss of bone structure as shown by an X-ray photograph, by the testimony of the employee as to how he could use it and by that of the physician who concluded his testimony with the statement that "The hand has no use as a hand." *Meley's Case*, 219 Mass. 136. *Floccher's Case*, 221 Mass. 54. There being reasonable evidence to support this finding, it is conclusive. *Herrick's Case*, 217 Mass. 111. *Sponatski's Case*, 220 Mass. 526, 530. *Burns's Case*, 218 Mass. 8.

The insurer contends that there can be no recovery in this case for specific compensation, because in the claim as filed, the nature of the compensation sought as well as the nature of the injury was not stated.

There is nothing in St. 1911, c. 751, Part II, §§ 15, 23, as amended by St. 1912, c. 571, § 5, which requires an injured employee to state at the peril of loss of compensation anything more than "the time, place, cause and nature of the injury." It is common knowledge that the results of physical injuries are very often not determinable at the time they are received; in the common course of events, a requirement that such result shall be stated is to demand the performance of an impossible thing.

The insurer argues that its agreement with the employee for specific additional compensation for twenty-five weeks for the loss of three fingers when approved by the Industrial Accident Board, was a final determination that the injury which the employee suffered was the loss of the fingers and not for injury to the hand rendering it permanently incapable of use. While the agreement as to additional compensation makes reference to "loss of three fingers of right hand," it does not state that it is intended

to cover all claims for other additional compensation under St. 1913, c. 445, § 1, as amended by St. 1914, c. 708, § 6 (e).

It follows that the agreement does not bar any action of the board based upon conditions which are not covered in the agreement. *Hunnewell's Case*, 220 Mass. 351.

The decree of the Superior Court* must be affirmed.

So ordered.

J. F. Scannell, for the insurer.

C. J. McGilvray, for the employee, submitted the case without argument or brief.

CARL H. THRESHER & another vs. FREDERICK SIMPSON.

Suffolk. January 18, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Landlord and Tenant. Damages, In recoupment. Corporation.

In an action upon a covenant in a lease for the rent of a store, the defendant sought to recoup damages for the breach by the plaintiff, the lessor, whose place of business was near by on the same street, of a covenant in the lease by which he agreed not to sell neckties or underwear during the term of the lease. It appeared that the leased store was not used by the defendant personally but was used by a corporation, of which the defendant was manager, to which he had transferred all his business and of which he held all the capital stock except two or three shares, and that the relation of the lessee to the corporation was known to the lessor when the lease was made. *Held*, that the defendant could recover in recoupment only nominal damages, as the loss from the plaintiff's breach of the covenant not to sell neckties and underwear had been suffered by the corporation and not by the defendant; that the corporation, which was not a party to the lease, had no rights under the covenant, and that the defendant, with whom the covenant was made, could not claim damages suffered by him as the manager and principal stockholder of the corporation, such indirect consequential loss as he thus had sustained not being as matter of law within the contemplation of the parties to the covenant nor following a breach of the covenant as a natural consequence.

CARROLL, J. June 5, 1906, the plaintiffs leased to the defendant part of the premises numbered 44-46 Temple Place, Boston, for the term of eight years beginning June 1, 1906. The lease con-

* Entered by order of *Wait*, J., affirming the decision of the Industrial Accident Board.

tained the clause: "The lessors shall not engage in the business of selling . . . neckties, underwear, . . . or sublet to anybody else who will engage in the sale of the above mentioned articles or goods, . . . during said term and for one year thereafter." The plaintiffs' place of business was 35 Temple Place. In March or April, 1906, the defendant formed the Simpson Company, a corporation, to which he transferred his business and in which he held all the capital stock, except two or three shares. Said corporation carried on the business thereafter upon the leased premises, until the date of the plaintiffs' writ, the defendant acting as the manager for the corporation. This is an action for rent due under the lease, the defendant seeking to recoup for damages caused by the plaintiffs' violation of the terms of the lease in selling neckties and underwear.

The defendant excepted to the ruling of the judge,* that the defendant was not entitled to recoup against the plaintiffs. The judge found for the plaintiffs in the sum of \$1,704.28, "being the amount of the plaintiffs' claim, less one dollar allowed the defendant under his answer in recoupment as nominal damages." The lease was under seal. The Simpson Company, a corporation, was not a party thereto. It could not at law, therefore, maintain an action thereon, and could not recoup in damages against the plaintiffs. *Boyden v. Hill*, 198 Mass. 477, 487. *McCarthy v. Henderson*, 138 Mass. 310.

The defendant was the manager of the corporation at the date of the lease and at the date of the writ. He did not individually carry on the business, and was not as such engaged in the business of selling the articles which the plaintiffs agreed not to sell. The business for which the defendant was manager was owned and carried on by a corporation, — something separate and distinct from the defendant. The plaintiffs made no contract with the Simpson Company and were under no obligation to refrain from competing with it.

The defendant argues that he is entitled to damages because the loss to the corporation, of business by the competition of the plaintiffs, was a loss to him, he being in effect the sole owner of the corporation. The damages which the defendant sustained in

* *Ratigan, J.*

a collateral undertaking, as a stockholder in a corporation, by reason of the plaintiffs' competition, in violating the covenants of the lease by the sale of the specific articles, were not as matter of law such damages as were contemplated by the parties to the lease, nor considered to be a result of its breach, neither do they follow as a natural consequence therefrom. As stated by Rugg, C. J., in *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 380, "Such loss may be recovered when it appears to have been within the contemplation of the parties as a probable result of breach of the contract, to be its natural, primary and probable consequence, and to be susceptible of proof by evidence reasonably certain, and not resting chiefly on speculation, conjecture or surmise." Applying this standard, it seems clear that the defendant cannot recover from the plaintiffs, damages which he suffered as manager and stockholder of the corporation.*

Kelly v. Greany, 216 Mass. 296, relied on by the defendant, was an action for breach of a covenant against incumbrances. The incumbrance was a tax, duly assessed on the premises conveyed, which the plaintiff, the grantee in the deed from the defendant, paid, after he had conveyed the land to the present owners, for whom he was acting as a conveyancer. It was held he could recover. *Boyden v. Hill*, *supra*, decided that where the contract with the defendant was upon the express stipulation that it should be enforceable only upon a certain corporation electing to take advantage of it, when that election was made, if the plaintiff's

* The defendant offered to prove that at the time of the making of this lease the business was being carried on by Simpson Company, the corporation; that at the time the lease was made the plaintiffs knew that the business was being carried on by the corporation and that the defendant was going to carry on the business as a corporation, that by reason of the damage resulting from the breach of the covenant by the plaintiffs the corporation lost money to such an extent that the defendant personally was required to put into the corporation a large sum of money and that as manager and as principal stockholder of the corporation the defendant lost money which might have accrued to him as salary and in dividends as a stockholder of the corporation.

Upon the testimony and the offer of proof, the presiding judge ruled as a matter of law, that the defendant was not entitled to recoup against the plaintiffs; to which ruling the defendant excepted. Thereafter the judge allowed the defendant under his answer in recoupment \$1 as nominal damages.

relation had not been changed by contract, he became the trustee and could recover for the benefit of the corporation, such damages as the corporation could itself have recovered if it was a party to the contract. These cases do not sustain the contention of the defendant, that, in the case at bar, the lessee, when sued for rent, can recover damages for the benefit of a corporation of which he is the manager, and a large stockholder, which corporation is a stranger to the deed and could not itself recover from the plaintiffs.

Exceptions overruled.

E. V. Grabill, for the defendant.

F. C. Allen, (*R. E. Smith* with him,) for the plaintiffs.



PHILIP CAREY COMPANY vs. DAVID H. PINGREE & another,
trustees.

Middlesex. January 19, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, What constitutes. *Trust*, Personal liability of trustee.

If two persons, who are the trustees of a real estate trust, make a contract in writing for work and material to be furnished to them and sign the contract with the word "trustees" after their names, they are none the less on this account liable on the contract personally.

CARROLL, J. This is an action for work and material. The defendants are trustees of the Melrose Real Estate Trust. They contend that they are not liable, because the work and material were furnished to the trust and the contract was signed by them not, as individuals, but as trustees. At the trial, against the exception of the plaintiff, the defendants introduced evidence of an oral agreement, made before the written contract was signed, by which the plaintiff agreed not to look to the defendants for payment.

The jury found in answer to a question, that there was no such oral agreement, and also found for the plaintiff. The case is here

on a report made by the judge * at the request of the defendants, which is in substance, that if no error of law appears, judgment is to be entered for the plaintiff.

The defendants attempted to prove that there was this oral agreement, earlier in date than the written. Even if this evidence were admissible, they cannot now complain of any error of law, since the jury found, as a fact, that there was no such agreement.

By adding the word "trustee" to their names, the defendants did not exempt themselves from personal responsibility, nor did they, by such a signature, provide that the plaintiff was to look solely to the trust estate. *Carr v. Leahy*, 217 Mass. 438.

According to the terms of the report, judgment is to be entered for the plaintiff, for the sum of \$725.71 and interest from the date of the verdict.

So ordered.

C. W. Noyes, J. R. Wellman & C. H. Gilmore, for the defendant Pingree, submitted a brief.

C. A. Castle, for the defendant Townsend, submitted a brief.

J. B. Jacobs, for the plaintiff.

C. A. WYCHE & others vs. DOROTHY V. UEBELHOER.

Suffolk. January 20, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Appeal. *Evidence*, Presumptions and burden of proof. *Municipal Court of the City of Boston*.

A judge of the Municipal Court of the City of Boston, at the trial before him of an action of contract, rightly may refuse to make a ruling that "Upon all the evidence the finding should be for the defendant," if there is evidence on which he can and does find for the plaintiff.

CARROLL, J. This is an action of contract for rent. There was evidence that the defendant occupied a tenement of the plaintiff's from May 1, 1913, to August 15, 1914; that she was notified on

* *Bell, J.*

or before January 1, 1914, of the purchase of the property, by the plaintiffs, and paid rent to their agent to April 1, 1914. There was also evidence, on behalf of the defendant, that she was under twenty-one years of age, that she never knew the plaintiffs were the owners of the property, "and that the apartment was not suitably heated in the winter of 1913-1914, of which she complained to the plaintiffs."

The defendant requested the judge to rule, "Upon all the evidence the finding should be for the defendant." The judge refused so to rule and found for the plaintiffs * for rent for the months from April to August, 1914. Whether we consider this as a request for a finding of fact, or a ruling of law, we cannot say that the judge was wrong. There is no statement by the judge that all the evidence is reported, and there is nothing before us in the record on which we can say he was obliged to find for the defendant. Finding the facts as he did, he could not give the ruling requested as matter of law. *Cohen v. Berkowitz*, 215 Mass. 68. *Bailey v. Marden*, 193 Mass. 277.

Order dismissing the report affirmed.

The case was submitted on briefs.

W. H. Thorpe, for the defendant.

S. Bamber, for the plaintiffs.

IRENE KENNEDY vs. DAVID B. ARMSTRONG.

Suffolk. January 21, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Practice, Civil, Conduct of trial: instructions to disregard certain evidence, Cases tried together. *Evidence*, Opinion, Admissible against defendant in one only of two cases tried together. *Joint Tortfeasors*.

It is not an abuse of judicial discretion for a judge, who is presiding at the trial together of two actions of tort by the same plaintiff against different defendants for personal injuries resulting from a collision of automobiles, to refuse to stop the trial and to take one of the cases from the jury merely because the plaintiff's coun-

* The action was brought in the Municipal Court of the City of Boston. A report by the judge of his findings to the Appellate Division was dismissed; and the defendant appealed.

sel, in cross-examination of a medical expert called by the defendant in that case, with what the judge found to be "no intention, or censurable fault" on his part, asked the witness if, in testifying in court, he "usually" had testified "for an insurance company or defendant," which, it was contended, would suggest to the jury that the defendant was insured and that the defendant in interest was an insurance company, although, in cross-examination of a witness for the same defendant by the counsel for the other defendant, the witness made an irresponsible answer indicating that the first defendant had referred him to an insurance company.

No exception lies to the admission of evidence which the presiding judge afterwards during the trial orders stricken from the case.

Whether, at the trial of actions for personal injuries resulting from a collision of automobiles, testimony of a witness, that he was in a position to hear the horn of either of the automobiles, is admissible, it was not necessary to decide in the present case.

If, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases, against the objection and exception of the defendant in the other case, but without objection by the plaintiff, offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites facts tending to show that the collision occurred without fault of that driver and because of negligence of the other defendant, and the presiding judge several times instructs the jury clearly and decisively that the statement was not evidence against the other defendant and must be disregarded as to him, the exception must be overruled.

TORT for personal injuries received in a collision between an automobile of the R. & L. Company, in which the plaintiff was, and an automobile of the defendant. Writ dated June 5, 1913.

The action was tried before *King, J.*, together with one by the same plaintiff against the R. & L. Company. In the course of the cross-examination, by the counsel for the defendant Armstrong, of an employee of the R. & L. Company, it appeared that one Warren, the driver of the automobile of the R. & L. Company, had made a report to his employer immediately after the accident. In cross-examination of the witness by the counsel for the plaintiff, it appeared that the report had been sworn to but that the original could not be found, and that the witness could not remember that the report was signed "William H. Warren, R. & L. Company, 915 Boylston Street, Boston." On redirect examination the witness was shown a paper procured from the plaintiff's counsel, which he testified was a copy of that report. After a colloquy of the counsel for the two defendants and the judge, the paper was offered and excluded.

The counsel for the plaintiff then asked the witness, "Since looking at the paper . . . is your memory so refreshed that you are now able to remember that Mr. Warren signed the paper William H. Warren, R. & L. Company, 915 Boylston Street?" and the witness answered, "No, no, because —"

The counsel for the R. & L. Company then again offered the paper, and, the plaintiff stating that he had no objection to it, the judge admitted it.

In the course of the colloquy with regard to the admission of the paper, the counsel for the defendant Armstrong stated to the presiding judge, "One further question. You have admitted it, as I understand it, as against the plaintiff, how can it be against the plaintiff?"

The judge replied, "I don't know, but he didn't object to it, I don't know that it acts against him, but he is not objecting to it, it being offered by one defendant, as between the R. & L. Company and the plaintiff, it is received without objection. As against the defendant Armstrong it is excluded, and the jury are expressly told not to consider it as far as Armstrong is concerned."

The entire paper then was read to the jury, the judge repeatedly interjecting instructions that it was in no sense evidence that the jury could consider against the defendant Armstrong. The defendant Armstrong excepted. The contents of the paper were as follows:

"Saturday, May 3rd, 1913. About 4.45 P.M. while driving a Garford automobile, Model G. 8 Chasis 214 touring car, registered in Massachusetts under number 0526J, property of the R. & L. Company, on Cross Street, Somerville, in the direction of Boston, Mass., a car driven by David B. Armstrong, registered under number 0834B Massachusetts, came out of Flint Street, giving no audible signal, and struck the car I was driving at right hand rear wheel, breaking three spokes in wheel, bent rear fender beyond repair, dented touring body, smashed hub cap and caused injuries to the brake and axle. This accident was unavoidable on my part. The occupants of my car were E. A. Gilmore, 200 Devonshire Street, Irene Kennedy, 200 Devonshire Street, and Reginald Gilmore, 14 years old. The occupants of the car driven by David Armstrong were Abner T. Armstrong and J. W. Palmer of Somerville. I was driving at the rate of 15 miles an hour and

was on the proper side of the road, namely, the right hand side. The registration number 0834B, Massachusetts, is under the name of Armstrong and Curtis, Somerville, Mass. William H. Warren, R. & L. Company, 915 Boylston Street, Boston."

There was a verdict for the plaintiff in the sum of \$15,505. On motion of the defendant it was ordered that the verdict be set aside unless the plaintiff should remit \$6,000 therefrom, the judge filing the following memorandum:

"1. I deem the damages awarded the plaintiff excessive for the injuries sustained by her.

"2. Through no intention, or censurable fault of counsel, but through probable inadvertence of a witness, the jury that tried this cause learned, or had reason to believe, that the defendant had at the time of the plaintiff's injury some sort of insurance relating thereto and affecting his liability therefor. It seems to me natural, if not almost inevitable, that a verdict should in such a case, and that this verdict does, to a substantial extent, reflect the influence upon the jury of this information. With some hesitation I concluded at the time not to stop the trial of this cause and another being tried therewith because such information or suggestion of insurance had come to the knowledge of the jury. Nor do I now feel called upon to set aside the verdict absolutely. But it seems to me to be in furtherance of justice to give the plaintiff an opportunity to remit a part of her verdict, and only in case of her refusal to do so, to set aside the verdict absolutely and direct a new trial."

Other facts are stated in the opinion.

The defendant alleged exceptions.

C. A. Dunham, for the defendant.

E. Field, for the plaintiff.

CARROLL, J. The plaintiff was injured while in an automobile of the R. & L. Company, which collided with an automobile of the defendant. She brought suit against both the defendant and the R. & L. Company. The cases were tried together and a verdict of \$15,505 was recovered against each. On the defendant's motion to set aside the verdict, the judge * ordered the verdict set aside unless the plaintiff remitted \$6,000, to which she agreed.

1. Dr. Davison, a witness for the defendant Armstrong, on

* *King, J.*

cross-examination by the plaintiff was asked: "How frequently do you testify in court?" to which he answered: "I have testified in court twenty times." This question was then put to him by the plaintiff's counsel: "Usually for an insurance company or defendant?" This question was not answered, the defendant asking to have the case taken from the jury. The judge refused this request, to which refusal the defendant excepted. If the judge thought this question was asked for the purpose of leading the jury to suppose an insurance company, and not the defendant, was the real defendant, thus turning their minds from the real issue in the case and tending to arouse prejudice against the defendant, the judge had the right in the exercise of a sound judicial discretion to take the case from the jury. There is nothing in the evidence, however, to show that there was any abuse of this discretion in refusing the request of the defendant, and we cannot revise his decision. In fact, the judge in his statement filed with the decision on the motion to set aside the verdict says there was "no intention, or censurable fault of counsel." The plaintiff clearly was not at fault because a witness, who was later called by one of the defendants, and while he was under cross-examination by the counsel for the other defendant, made an irresponsible answer indicating that Armstrong referred him to the insurance company. *Nickerson v. Glines*, 220 Mass. 333.

2. A witness for the plaintiff testified that she was in a position to hear the horn of either automobile, if blown. To this the defendant excepted and later the judge ordered the testimony stricken out. Even if this evidence were inadmissible, a question which we are not called upon to decide, (see *Slattery v. New York, New Haven, & Hartford Railroad*, 203 Mass. 453; *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532,) this exception must be overruled, because the judge ordered the evidence to be stricken from the case.

3. A witness was permitted to read from a paper purporting to be a copy of a statement made by the driver of the R. & L. Company's automobile. It was offered by the R. & L. Company as evidence against the plaintiff. The cases against the R. & L. Company and this defendant were tried together, and each defendant had the right to present all the material evidence bearing on the issue, even if prejudicial to the other. The judge more than

once, while the admissibility of the evidence was under discussion, and again when the witness was testifying, instructed the jury clearly and decisively that the statement was not evidence against Armstrong and must be entirely disregarded as to him. We do not see what more the judge could have done to protect the defendant's rights. *Williams v. Taunton*, 125 Mass. 34, 39, 40. *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577. *Jones v. Boston*, 197 Mass. 66.

The remaining exceptions are not argued on the defendant's brief, and we consider them waived.

Exceptions overruled.

MARCUS M. ESTABROOK vs. JOHN G. MOULTON, administrator.

Suffolk. January 25, 1916. — March 4, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, For establishment of debt against estate barred by short statute of limitations. *Limitations, Statute of. Executor and Administrator. Words, "Culpable neglect."*

In a suit in equity under R. L. c. 141, § 10, against an administrator to establish a debt alleged to be due to the plaintiff which was barred under § 9 of that chapter because no suit for its collection had been commenced within two years from the time when the administrator gave his bond, it appeared that the debt was a balance due upon a promissory note given by the deceased to the plaintiff in January of a certain year payable in four months; that on the due date the deceased made a payment on account of the note and died two years later, that the defendant gave bond as administrator less than two months thereafter, that the plaintiff and the deceased had lived in that part of Boston formerly West Roxbury, that the plaintiff never saw nor heard from the deceased after the payment was made on account of the note and never made any attempt to find him until about two years and eight months after his death, when he wrote to the administrator, and that, for a period of from four to six months after the death of the defendant's intestate, the plaintiff was absent from the Commonwealth. *Held*, that a finding was warranted that the plaintiff had been guilty of "culpable neglect," which under the provisions of the statute was a bar to the suit.

CARROLL, J. January 28, 1907, William H. Moulton made a promissory note, payable in four months to the plaintiff, for the sum of \$321.70. On May 28, 1907, \$100 was paid thereon. Wil-

liam H. Moulton died May 28, 1909, and on July 8, 1909, the defendant was appointed administrator of his estate and gave bond. Due notice of his appointment was given.

More than two years thereafter, March 22, 1912, this bill in equity was filed under R. L. c. 141, § 10.

The single justice * found the plaintiff was guilty of "culpable neglect" under R. L. c. 141, § 10, and ordered the bill dismissed.

If the failure of the plaintiff to collect from the estate of his debtor is to be fairly charged to his own carelessness, he was "blameworthy," and was therefore guilty of "culpable neglect," as explained by Hoar, J., in *Waltham Bank v. Wright*, 8 Allen, 121. The plaintiff was in no way deceived by the defendant, no misrepresentation was made to him and no deception was practiced on him. Although the plaintiff and the deceased lived in the same city,† the plaintiff did not see him after the time the payment of \$100 was made, evidently heard nothing from him and made no attempt to find him, until January 31, 1912, which was about two years and eight months after his death, at which time the plaintiff wrote to the defendant. A few letters passed between them, when this bill in equity was brought. The plaintiff was absent from the Commonwealth from four to six months after the death of the defendant's intestate, and had no knowledge of the latter's death or of the appointment of an administrator until about two years and six months after the period of limitation had expired. These circumstances do not excuse him. He had the means of knowing his rights. All the facts necessary to aid him in securing them could have been discovered. He made no investigation or inquiry and cannot now, when he alone was at fault and has rested on his rights, invoke the aid of the court to assist him in collecting his debt, after the statute has become a bar. *Sykes v. Meacham*, 103 Mass. 285. *Marlett v. Jackman*, 3 Allen, 287. *Powow River National Bank v. Abbott*, 179 Mass. 336.

Decree dismissing bill with costs affirmed.

The case was submitted on briefs.

E. C. Jenney, for the plaintiff.

E. N. Lacey, for the defendant.

* *Hammond*, J.

† Both lived in that part of Boston formerly West Roxbury.

JAMES CUNNINGHAM & another vs. WORCESTER FIVE CENTS SAVINGS BANK & another.

Worcester. January 26, 1916. — March 4, 1916.

Present: DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, Construction, Performance and breach. Equity Pleading and Practice, Request for rulings by master, Exceptions to master's report, Motions as to hearings before master and his report, Appeal.

Where an owner of land gives to a bank in writing an order to "pay to the order of" a building contractor a certain sum of money "on architect's order and authorization by" the owner, the bank acts within the order if it makes a payment to the contractor on an order in writing by the architect which is authorized by the landowner orally.

An exception to a finding of fact by a master which is not inconsistent with other findings in his report will be overruled if the evidence upon which the finding was made is not reported.

A master is justified in his discretion in refusing to consider requests for rulings which were presented to him for the first time more than a month after his draft report had been submitted to the parties and within the five days following the submission to counsel of the final draft of his report during which by Equity Rule 31 formal objections may be filed with him as the basis of exceptions to the report.

Incompleteness of a master's report is a proper ground for a motion to recommit the report, but it is not a proper subject of an exception to the report.

In the present suit the discretion of a judge who, after the filing of a master's report, heard and denied motions of the plaintiff to recommit the report, to vacate the report and commit the case to another master, to report the evidence, to strike out certain portions of the draft report, and for a further hearing, was held not to have been exercised wrongly.

BILL IN EQUITY, filed in the Superior Court on September 1, 1911, and afterwards amended, against the Worcester Five Cents Savings Bank and one Francis J. Yates, a building contractor, alleging in substance that the plaintiffs had given to the defendant bank a mortgage to secure their promissory note for \$4,800, that only \$1,600 of that amount had been paid to the plaintiffs by the defendant bank, that the defendant bank had paid to the defendant Yates without authorization by the plaintiffs an additional \$2,000, that, because the plaintiffs had refused to recognize that payment as a part of the debt secured by the mortgage and to pay interest thereon, the defendant bank had begun

foreclosure proceedings, and that the plaintiffs always have been ready and willing to pay the defendant bank \$1,600 and interest and still offered to do so. The prayers of the bill were that the defendant bank be enjoined from proceeding further with the foreclosure proceedings, that the amount due to the bank from the plaintiffs be determined, and that, upon payment of such amount by the plaintiffs to the bank, the mortgage be discharged.

The suit was referred to a master. The substance of his findings is stated in the opinion, where also are described seven motions by the plaintiffs. The motions were heard by *Fox, J.*, and, as stated in the opinion, five of them were denied. The plaintiffs alleged exceptions to the denial of such motions and the exceptions were allowed. While these exceptions were pending, the following order, purporting to be a decree and signed by *Wait, J.*, was filed:

"This cause came on to be heard on motion to confirm the master's report and for a decree, and was argued by counsel. On consideration thereof it is ordered that the exceptions to the report of the special master be and they are overruled, the report of the special master be and it is confirmed; and it is further ordered, adjudged and decreed that the bill of complaint be and it is dismissed, without costs."

The plaintiffs appealed from the foregoing "decree."

J. M. Hoy, (*E. O. Proctor* with him,) for the plaintiffs.

J. H. Reid, for the defendants.

CARROLL, J. The plaintiffs made a contract with Francis J. Yates to build a house. The plaintiffs borrowed from the defendant savings bank \$4,800 and gave a note for that amount, secured by a mortgage, and left with the bank an order directing it to "pay to the order of Francis J. Yates, on architect's order and authorization by James Cunningham, \$4,800." The bank paid \$1,600 on the joint order, in writing, of Cunningham and the architect, and later it made a payment of \$2,000 to Yates on the written order of the architect, not authorized, in writing, by Cunningham but orally, by him.

The case was referred to a master. He found that Yates demanded of Cunningham the balance due on the contract, and Cunningham said, "Go to the architect and if he says it is all

right, you can get your money." The architect gave Yates a certificate, he presented it at the bank and was paid \$2,000.

Under the agreement filed with the bank, Cunningham could have authorized Yates to receive the money, without any writing to that effect or notification. With the written order, all that it was necessary for the bank to know was that Yates was authorized by Cunningham to receive the amount stated. The master found that Yates was so authorized. The evidence is not reported and we cannot disturb the finding. *O'Brien v. Murphy*, 189 Mass. 353.

The master's first draft report was submitted to counsel on October 2, 1914. Certain requests of the plaintiffs were considered by the master and dealt with in his final draft, which was submitted to counsel on November 9, 1914. When this report was submitted, counsel were notified that five days were allowed to bring in written objections. Within the five days objections were filed and, at the same time, requests for rulings were filed by the plaintiffs. The master refused to consider these requests. There was no error in refusing them. They were not asked for at the proper time. As was said by Hammond, J., in *Graves v. Hicks*, 194 Mass. 524, when considering Rule 45 of the Superior Court, providing that an exception, to be allowed, must be taken at the time the opinion, ruling, direction or judgment was given, "we think that the principle should be applied to orders in equity."

The plaintiffs then filed exceptions fourteen to sixteen. Exception fourteen was properly overruled. It was based on the master's refusal to grant the requests above referred to. The fifteenth exception, in effect, was that the report was incomplete. This was a matter to be passed upon by the judge, on proper motion, and the motion of the plaintiffs to this effect was later considered by him. This exception was properly overruled.

There was no error in overruling the sixteenth exception.

The plaintiffs then filed seven motions, some of which were allowed. The judge refused the motions, (1) to recommit the report, (2) to vacate the report and commit it to another master, (3) to report the evidence, (4) to strike out from draft report, (5) for further hearing. These were all matters within the discretion of the court and we see nothing wrong in the decision.

Bakshian v. Hassanoff, 186 Mass. 255. *Parker v. Nickerson*, 137 Mass. 487. *Henderson v. Foster*, 182 Mass. 447. *New York Bank Note Co. v. Kidder Press Manuf. Co.* 192 Mass. 391. *Ginn v. Almy*, 212 Mass. 486, 496. To these rulings of the judge the plaintiffs filed exceptions, they also appealed. No final decree could be entered when exceptions were pending, and we treat the form of decree as an order for a decree.

Exceptions overruled.

Order for a decree dismissing plaintiffs' bill affirmed.

EDWARD J. O'NEIL, executor, vs. JOHN H. COGSWELL, administrator *de bonis non*, & another.

Suffolk. January 26, 1916. — March 4, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, & CARROLL, JJ.

Devise and Legacy, Specific legacy, Ademption. *Evidence*, Presumptions and burden of proof.

A legacy of a certain mortgage note to the owner of the mortgaged property, accompanied by an instruction to the executor of the will to discharge the mortgage securing the note, is a specific legacy of the note.

Where a widow who, as the administratrix of the estate of her husband, came into possession, as a part of the assets of his estate, of a certain mortgage and the note secured thereby, which was payable to a former holder of the mortgage and by him had been indorsed in blank, pays the debts and charges of the estate, makes payments to two sons, who were the sole next of kin, on account of their distributive shares, mingles her own funds with those of the estate and uses for her own account about one half of the funds distributed by her, the mere fact that, at the time of her death, the mortgage note, with no additional indorsements upon it, and the mortgage, unaccompanied by any assignment by her as administratrix to herself individually, are found in a safe deposit box rented in her name and containing both securities belonging to her and securities belonging to her husband's estate, together with the fact that, by a provision of her will made three days before her death, she had made a specific legacy of the mortgage note to the owner of the real estate and had instructed the executor of the will to discharge the mortgage, will not warrant a finding that she owned the note and mortgage at the time of her death, and therefore nothing passes by the specific legacy.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 15, 1914, begun by Maria Emma Keefe (and afterward prosecuted by the executor of her will) against John H. Cogswell, adminis-

trator *de bonis non* of the estate of John D. Gilman, and Wilford D. Gray, administrator with the will annexed of the estate of Annie C. Gilman, who was the wife of John D. Gilman, alleging in substance that the plaintiff was the owner of certain real estate in South Boston which was subject to a mortgage securing a note of \$800 held by John D. Gilman at the time of his death; that Annie C. Gilman had been appointed administratrix of the estate of her husband and had performed all her duties as administratrix and had distributed substantially all the assets of the estate among herself and the next of kin, two sons, and that among the assets distributed to herself were the Keefe note and the mortgage securing it, but that by accident, mistake or inadvertence she did not make a formal assignment of the mortgage to herself; that on her death Annie C. Gilman by her will gave the Keefe note to the plaintiff and directed the executor of her will to discharge the mortgage, both the note and the mortgage then being among her effects; that the defendant, the administrator with the will annexed of her estate, denied that the note and mortgage were a part of her estate and had delivered them to the defendant, the administrator *de bonis non* of the estate of John D. Gilman. The prayers of the bill were that the mortgage should be discharged and that the note should be delivered to the plaintiff.

After the suit was brought, Maria Emma Keefe died and the executor of her will was admitted to prosecute the suit in her stead.

The suit was referred to a master. Among other facts, he found that the mortgage and mortgage note in question originally had been given to one O'Keefe, who had indorsed the note in blank and had executed an assignment of the mortgage and had delivered both to John D. Gilman, who held them at the time of his death, that Annie C. Gilman never had filed any account of her administration of the estate of her husband, and that her will was made three days before her death. He also found that the "only evidence of any distribution of the estate of John D. Gilman by Annie C. Gilman by which it may be determined that she had set apart the said note and mortgage to herself as part of her distributive share therein is such inference as may be drawn from the clause in her will whereby she sought to dispose of the same

as her individual property." Other material facts found by him are stated in the opinion.

A final decree dismissing the bill was entered by order of *Pierce, J.*, and the plaintiff appealed.

H. V. Cunningham, (*W. L. Burt* with him,) for the plaintiff.

W. D. Gray, (*J. H. Cogswell* with him,) for the defendants.

CARROLL, J. John D. Gilman, at the time of his death, October 21, 1909, was the owner of a note for the sum of \$800. David F. Keefe was the maker. Annie C. Gilman was appointed administratrix of the estate of John D. Gilman, her husband. She filed no account as such administratrix and on her death in March, 1912, John H. Cogswell was appointed administrator *de bonis non* of Gilman's estate. David F. Keefe died before Gilman, leaving a widow, Maria Emma Keefe, who died after this suit was begun, and the executor of whose will is the plaintiff. She then owned the mortgaged real estate. She was a half sister of Mrs. Gilman, who in her will provided: "To my step-sister, Maria Emma Keefe, of South Boston, Massachusetts, I give and bequeath the promissory note for eight hundred dollars made by her and her late husband and secured by mortgage of real estate numbered 63 Baxter Street South Boston, and I instruct and authorize my said executor to cancel and discharge said mortgage in the Registry of Deeds Suffolk County."

The master reported that on the death of the testatrix, in a safe deposit box, rented in her name, there were found securities belonging to Mrs. Gilman and to the estate of her deceased husband. The note and mortgage were found in this box. They had never been assigned or indorsed "from herself as administratrix to herself individually, and, further than the clause in her will by which she sought to dispose of it as her individual property, there is no evidence that she ever made any attempt to transfer the ownership to herself individually." Mrs. Gilman mingled her own funds with those of the estate. She paid the debts and charges, amounting to \$10,383.77, and, to the sons of Mr. Gilman by a former marriage, she paid to one the sum of \$3,115.50, and to the other the sum of \$1,255.64, on account of their respective distributive shares, and used for her own account money of the estate to the amount of \$4,324.54.

This particular note and mortgage in question were so desig-

nated and set apart in the will that they are a specific, as distinguished from a general or demonstrative, legacy. *Bullard v. Leach*, 213 Mass. 117, and cases cited.

If some one other than Mrs. Gilman was the administrator of her husband's estate, and, without rendering any account, continued to hold the note and mortgage in his possession without indorsement or assignment, it would hardly be contended that Mrs. Gilman was the owner thereof. The fact that she herself was the administratrix does not make her the owner of the securities. They were not hers. They were the property of her husband's estate, and she had no more title to them individually than would be the case, if the administrator of the estate was a stranger to her.

As the legacy was specific, if Mrs. Gilman never owned the securities, or, having formerly owned them, had disposed of them before her death, it could not take effect; and, whatever her intention, even though she sought to provide for her sister by relieving the mortgage on her home, nevertheless, as Mrs. Gilman did not own the property at the time of her death, the legacy failed. *Tomlinson v. Bury*, 145 Mass. 346. *Hazard v. Gushee*, 35 R. I. 438, 448.

Decree dismissing the bill affirmed.

N. WARD COMPANY vs. CITY OF BOSTON.

Middlesex. January 26, 1916. — March 4, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Venue. Eminent Domain. Boston. Damages, For property taken or impaired under statutory authority.

A petition to assess damages for land taken by the street commissioners of the city of Boston under St. 1909, c. 486, § 31, by a taking originally invalid which afterwards was made valid by the confirmatory statute St. 1914, c. 569, can be filed only in the county of Suffolk, and such a petition filed in the county of Middlesex must be dismissed.

CARROLL, J. This is a petition for a jury to assess damages for land taken by the respondent under St. 1909, c. 486, § 31.

It was decided in *N. Ward Co. v. Street Commissioners*, 217 Mass. 381, that the original taking was not valid. St. 1914, c. 569, ratified and confirmed all takings of land for municipal purposes by the street commissioners of the city of Boston and gave to those whose land was taken the right to file in the clerk's office of the Superior Court for the county of Suffolk, a petition for a jury to assess the damages. This petition was brought in the county of Middlesex and, on motion of the respondent, the petition was dismissed.* The petitioner appealed. The question is, Can the proceedings under the statute be made returnable in Middlesex County, or only in the county of Suffolk?

R. L. c. 167, § 8, directs that actions by or against the city of Boston, with exceptions not material here, may be brought in the county of Suffolk, Essex, Middlesex or Norfolk, or in the county in which the plaintiff lives. The petitioner claims that this statute governs, and the petition was properly brought in the county of Middlesex. St. 1909, c. 486, § 31, under which the land of the petitioner was taken, provides that, when land is taken under the statute by right of eminent domain, it shall be paid for in the manner provided for the taking of and the payment of damages for land taken for highways in said city. St. 1906, c. 393, an act relative to highways in the city of Boston, in § 2 gives to the person damaged in his property the right to apply for a jury in the county of Suffolk, and under R. L. c. 48, § 90, the damages for the laying out, relocation, alteration, widening or discontinuance of or the ordering specific repairs on a highway in the city of Boston, must be sought in the county of Suffolk. See also St. 1906, c. 463, Part II, § 7.

The validating act of 1914, *supra*, requires the petition to be filed in Suffolk County.

It was the intention of the Legislature, we think, in the matter of the assessment of damages for the taking of land under this statute, to limit the petitioner to the county of Suffolk. If it did not so intend, the particular language requiring the application for a jury to be made in the county of Suffolk would not have been used. The words were inserted in the act for the purpose of confining the proceedings to the county of Suffolk. The rights of the petitioner are governed by the statute, and the remedy therein

* By order of *Wait, J.*

provided, including the direction regulating the venue of the petition, is exclusive. *Lancy v. Boston*, 185 Mass. 219. *Perry v. Worcester*, 6 Gray, 544, 546.

The order of the court allowing the motion of the respondent, dismissing the plaintiff's petition, is affirmed.

So ordered.

G. L. Mayberry, (*L. A. Mayberry* with him,) for the petitioner.

G. A. Flynn, for the respondent.

LUKE H. KELTY & another vs. CITY CLERK OF LOWELL.

Suffolk. January 26, 1916. — March 4, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Lowell. Referendum. Municipal Corporations.

An order passed by the municipal council of Lowell to extend a certain street in that city from one street named to another street named is not "the granting, renewal or extending of any general franchise or general right to occupy or use the streets, highways, bridges or public places in the city," and therefore under the provision of the amended charter of the city of Lowell contained in St. 1911, c. 645, § 61, a petition for a referendum vote upon such order must be filed in the office of the city clerk during the ten days next following the passage of the order, and not merely during the thirty days next following its passage.

CARROLL, J. This is a petition for a writ of mandamus,* to compel the city clerk of Lowell to attach a certificate to a petition for a referendum filed under § 61 of St. 1911, c. 645, entitled, "An Act to amend the charter of the city of Lowell." The question in the case is this: Was the petition filed in due time, as required by the above statute?

Section 28 of the statute declares, in substance, that any measure passed by the municipal council of Lowell, unless otherwise provided, shall take effect at the expiration of ten days from its

* Reserved by *De Courcy, J.*, for determination by the full court.

passage. Section 61 * gives to the qualified voters of the city the right to pass on certain measures enacted by the municipal council, but, in order to present the question to the voters for decision, certain conditions, mentioned in the statute, must be complied with.

One condition is that a petition must be filed in the office of the city clerk. This petition, under the section last referred to, in the case of the granting, renewal or extension of a general franchise or general right to occupy or use the streets of the city, must be filed within thirty days. In all other matters, so far as here material, the petition must be filed within ten days next following the passage of the measure.

On November 16, 1915, the municipal council of Lowell passed an order to borrow \$71,000 for the construction and extension of Dummer Street. November 18, 1915, the municipal council passed an order to extend Dummer Street from Market Street to Merrimack Street. Within thirty days after the passage of the order of November 18, 1915, but not within ten days thereafter, the petition relied on in this case was filed in the city clerk's office. The petitioners contend it was seasonably filed.

The right to review the action of the municipal council of the city of Lowell is given by the Legislature, and to exercise it the terms and conditions of the grant must be followed. There can

* The first part of that section is as follows: "Section 61. If, during the ten days, or in case of the granting, renewal or extending of any general franchise or general right to occupy or use the streets, highways, bridges or public places in the city, if during the thirty days next following the passage of any measure by the municipal council except an order, resolution or vote for the immediate preservation of the public peace, health or safety as provided in section twenty-seven of this act, a petition, signed by a number of voters of said city qualified to vote at city elections, equal to at least fifteen per cent of the aggregate number of votes cast for candidates for mayor at the last preceding annual city election at which a mayor was elected, and protesting against the passage of such measure, shall be filed in the office of the city clerk, such measure shall be suspended from going into operation, and it shall be the duty of the municipal council to reconsider the same, and if it is not wholly repealed, the municipal council shall submit it, as is provided in subdivision (b) of section sixty, to the qualified voters of the city, and the said measure shall not go into effect or become operative unless a majority of the voters, qualified as aforesaid, voting on the same shall vote in favor thereof."

be no such reconsideration of the order in question unless the petition was filed within the proper time. The time mentioned in the statute is a matter of importance. It is mandatory, not merely directory, and must be obeyed.

If the order of November 18, 1915, amounted to the concession of a general franchise, a right to occupy or use the highways and public places of the city of Lowell, the petition was filed within the time required by law. The measure in question was not such an order. It was an order to extend Dummer Street from Market Street to Merrimack Street for the common convenience, to take in fee by right of eminent domain certain therein described parcels of real estate and awarding damages for the land so taken. Such an order is clearly not the gift of a franchise or privilege to an individual or corporation to use the streets of the city of Lowell.

As the requirement of the statute with respect to time was not observed, the city clerk could not attach a certificate of "sufficiency" to the petition, and it is now unnecessary to decide whether a certificate of "insufficiency" should have been attached thereto, in view of this delay on the part of the petitioners.

Because the petition under § 61 of the charter was not filed in the office of the city clerk within the time required thereby, this petition for a writ of mandamus must be denied.

So ordered.

J. J. O'Connor, for the petitioners.

J. J. Hennessy, for the respondent.

A. J. TOWER COMPANY *vs.* COMMONWEALTH.

Suffolk. November 5, 1915. — March 7, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Tax, Excise on corporate franchise, On shares in national banks. *Corporation*,
Excise on franchise of domestic business corporations. *Bank*. *National Bank*.

Under St. 1909, c. 490, Part III, §§ 11, 20, 41, 43, the tax commissioner, in determining the amount of the franchise tax to be levied upon a domestic business corporation owning shares of stock in national banks, should treat such shares under § 43 as "securities which if owned by a natural person resi-

dent in this Commonwealth would be liable to taxation," and should refuse to make deductions of the value of these shares under § 41 as "securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation;" such shares being none the less liable to taxation because the taxes upon them are required by the statute to be paid by each bank after being assessed to the owner of the shares in the city or town where such bank is located, and the bank being given a lien on the shares for the payment of such taxes.

The rule for determining the amount of the franchise tax to be levied on domestic business corporations, which is stated above, does not violate U. S. Rev. Sts. § 5219.

Our tax law makes no discrimination in favor of shareholders of trust companies as against shareholders of national banks.

A difference in the method of taxing shares of stock in national banks and shares in other moneyed corporations does not amount to discrimination under U. S. Rev. Sts. § 5219, where it does not appear that this difference results in imposing a greater burden on national banks than upon other moneyed capital.

In deciding the points stated above it was assumed, without deciding it, that the payment of the property tax upon the shares of national bank stock owned by the plaintiff, a domestic business corporation, was valid.

RUGG, C. J. This suit in equity * is brought to test the validity of the excise tax laid upon the plaintiff's franchise as a corporation. The material facts are that the plaintiff, a domestic business corporation, owned shares in national banks doing business in Boston, which were assessed to the plaintiff and the tax thereon paid by the respective banks in accordance with the assumed requirements of the general tax act. St. 1909, c. 490, Part III, §§ 11-20. The validity of that assessment is not before us. In determining the amount of the franchise tax to be levied on the plaintiff, the tax commissioner treated these shares of national bank stock as "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation," Part III, § 43 of the tax act, and refused to make deductions of them as "securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation," under § 41 of the same part.

This method was in accordance with the tax law. Shares of stock in a national bank, if owned by a natural person resident in the Commonwealth, are made subject to taxation. It is provided by Part III, § 11, that "All the shares of stock in banks . . . existing by authority of the United States or of the Commonwealth,

* The case was reserved by *Braley, J.*, for determination by the full court.

and located within the Commonwealth, shall be assessed to the owner thereof in the city or town in which such bank is located." By the two following sections, the bank is required to pay the tax and is given a lien upon the shares for such payment. This tax is levied by authority of U. S. Rev. Sts. § 5219.

The tax thus assessed upon the shares of stock in national banks is not a tax upon the banks, but upon the shareholders. That is the plain language of the statute. The tax is assessed to the owners of the shares. Although the bank is required to pay the tax, it makes that payment not in its own right, but as agent for the shareholder. This follows, also, from the provision that the bank is given a lien on the shares for the payment of the tax. It hardly could be given a lien for its own tax. Impliedly it has a right of action if necessary to recover the amount so paid. So are the decisions. *National Bank of Commerce v. New Bedford*, 155 Mass. 313, 316. *Van Allen v. Assessors*, 3 Wall. 573, 584. *Home Savings Bank v. Des Moines*, 205 U. S. 503, 518. *Eliot National Bank v. Gill*, 134 C. C. A. 358. See *Corry v. Mayor & City Council of Baltimore*, 196 U. S. 466, 472.

The contention that natural persons, when owners, are liable only to assessment and not to taxation, is untenable. The assessment confessedly is made to the owner. But the tax is clearly paid on his account and by the bank as his special agent for that purpose. *Tappan v. Merchants' National Bank*, 19 Wall. 490. The indubitable conclusion is that shares of stock in national banks, when owned by a natural person resident in the Commonwealth, are liable to taxation.

It is urged that the Legislature otherwise has manifested an intention that such stock should not be included in the assets upon which the corporation franchise tax is computed. Reliance is placed on that part of § 17 which provides that "No bank, the shares in which are liable to taxation by section eleven, shall be liable thereto under the provisions of section forty-three, nor shall the shareholders be liable to taxation for their shares therein for any purpose, except under the provisions of this part." The words "this part" in this connection are not fairly referable to the sections dealing with the taxation of bank shares, but mean Part III of the tax act, which relates to "Taxation of Corporations." It is used manifestly in contrast to "Part I" and the other divi-

sions of the act called parts. Section 17 has no bearing upon the present issue. Its effect is to exempt banks whose shares are taxed under § 11 from a franchise excise under § 43, and to provide that the shareholders shall not be subjected to a property tax other than that established by § 11. The plaintiff is not taxed for a property tax on the shares save under § 11. Moreover, the exception at the end of the section evidently contemplates the possibility that they may be considered in determining the corporation excise tax of the owner of shares.

The express provision of § 18, to the effect that, in collecting the excise upon the franchises of savings banks and of insurance companies, certain deductions are to be made of the amounts paid as property tax upon shares of stock in national banks owned by savings banks or insurance companies, is strong argument that no such deduction was intended as to other corporations.

The most formidable argument against this interpretation is that in a certain limited way it results in the consideration, for the purpose of fixing the excise tax, of property which already has been subjected to taxation. That affords no constitutional objection to the validity of an excise tax statute. The tax levied upon the plaintiff, in determining the amount of which these shares were considered, is strictly an excise and not a property tax. It is an excise upon the privilege or commodity or franchise of existing and doing business as a corporation. *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35, both affirmed in 231 U. S. 68. It is no objection to the validity of such an excise that, in measuring its amount, consideration is given to property which could not be taxed, such as government bonds, *Commonwealth v. Hamilton Co.* 12 Allen, 298, affirmed in *Hamilton Co. v. Massachusetts*, 6 Wall. 632, real estate and personal property located in another State and there taxed, *American Glue Co. v. Commonwealth*, 195 Mass. 528, imported merchandise in bond, *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, or corporate stocks taxed in another jurisdiction, *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51. As was said in *Flint v. Stone Tracy Co.* 220 U. S. 107, at page 163, "The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property." Such taxation is not double taxation

in a constitutional sense. Doubtless every reasonable presumption is to be made against even this kind of *quasi* double taxation. If the instant statute involved a general scheme of such taxation, perhaps other considerations would arise. See *Oliver v. Washington Mills*, 11 Allen, 268, 279; *Loring v. Beverly*, 222 Mass. 331. But it does not evince a broad design to that end. It happens that in this comparatively narrow class of cases, probably not involving large numbers of persons or considerable amounts of property, there is an appearance of double taxation. Of course, if constitutional rights were involved, they would be protected. But no scheme of tax laws can be absolutely equal or work exact justice in every application. Approximation to that end is all that can be expected. Instances of a kindred kind of double taxation have been upheld. *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514, as expounded in *Worcester v. Board of Appeal*, 184 Mass. 460.

The circumstance, that the tax commissioner heretofore has not included shares of national bank stock in computing the franchise excise on corporations, is no reason why he should not now include it if the statute requires it. The terms of the legislative mandate must be followed. There is no room for the application of contemporaneous construction of doubtful statutes, as in *Burrage v. County of Bristol*, 210 Mass. 299.

The measure of the corporation excise tax of the plaintiff does not violate U. S. Rev. Sts. § 5219.* The differences between the calculation of the franchise excise of savings banks and of trust companies on the one side and the direct tax upon shares of na-

* That statute is as follows: "Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

tional bank stock is of no consequence. The words of the federal statute "do not embrace any moneyed capital . . . except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands." *Mercantile Bank v. New York*, 121 U. S. 138, 156.

The validity of our statute relating to the taxation of shares of stock in national banks, when in substantially the same form as now, was upheld in *Providence Institution for Savings v. Boston*, 101 Mass. 575, affirmed in *Bank of Redemption v. Boston*, 125 U. S. 60, 69.

Our tax law makes no discrimination in favor of the shareholders of trust companies, as against shareholders of national banks. The franchise excise upon the plaintiff, not being a tax upon property, is not taxation upon its shares of national bank stock, and hence its effect cannot be discriminatory as to taxation.

The general scheme of raising revenue by an excise upon the franchise value of domestic corporations and not taxing the shares of such corporations in the hands of their owners, is not a discrimination against the shareholders of national banks. That scheme of taxation is an endeavor to carry out the general policy of this Commonwealth of avoiding double taxation. It accomplishes that result by levying a direct property tax upon all the real and some of the tangible personal property of a corporation, and then levying an excise upon the value of the franchise as shown by deducting the value of its physical property, directly taxed as property, from the fair cash value of all the shares constituting its capital stock and imposing upon that franchise value an excise tax measured by the average rate of property taxation throughout the Commonwealth for a period of three years. This is the practical equivalent of a property tax. It would be unjust then to levy a tax on the shares of stock in the hands of their owners, for the whole property represented by such shares has once been taxed at its full value. Hence the law forbids any further taxing of such shares. Plainly, this is a reasonable and just exemption and in no sense discriminatory.

But, if it be assumed that there must be a closer comparison between the tax ultimately resting upon the stockholders in trust

companies and upon the stockholders of national banks, there is no discrimination against the latter. The tax upon shares of national bank stock is upon their fair cash value after deducting the proportionate part of the value of the real estate belonging to the bank at the rate prevailing in the city or town where the bank is located. § 11. The value of the franchise of a trust company for excise tax purposes is determined by estimating the fair cash value of all its shares after making deductions which as to trust companies could ordinarily mean only real estate. § 41. The method of ascertaining value is thus the same as to both. The rate is slightly different, that upon the shares of national bank stock being the local rate, while that of trust companies is the average rate for the Commonwealth. This variation is not discrimination. Very likely the rate upon trust companies in Boston was in excess of that upon shares of stock of national banks in Boston. There are other factors which show that there is no discrimination against national banks. But this is enough to show that our statute is not open to successful attack in this regard.

A difference in the method of taxing shares of stock in national banks and in other moneyed corporations does not amount necessarily to discrimination under U. S. Rev. Sts. § 5219. It must appear that this difference results in imposing a greater burden on national banks than upon other moneyed capital. *Covington v. First National Bank of Covington*, 198 U. S. 100, 114. Disregarding the difference in form between the two methods of taxation and looking only to the ultimate burden, as we have seen, there is no violation of the federal statute. *First National Bank of Garnett v. Ayers*, 160 U. S. 660.

This case has been considered and decided, as it was argued, upon the assumption that the payment of the property tax upon the shares of national bank stock owned by the plaintiff was valid, but without so deciding. That question is not affected by what has been said. See *Worcester v. Board of Appeal*, 184 Mass. 460.

Petition dismissed with costs.

S. F. Johnson & J. W. Farley, for the plaintiff.

W. H. Hitchcock, Assistant Attorney General, for the Commonwealth.

PASQUALE FIERRO'S (dependent's) CASE.

Suffolk. November 29, 1915. — March 7, 1916.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act, Dependency, Time of filing claim. *Evidence*, Competency, Official records.

If the widow of a deceased employee, who makes a claim under the workmen's compensation act as having been dependent upon her husband for support at the time of his death, is a native and resident of a foreign country and never has been in this country, where her husband remained continuously for six or eight years before his death, and if there is no evidence that she was living apart from her husband for justifiable cause or that he deserted her, she cannot be awarded compensation under clause (a) of St. 1914, c. 708, § 3, as a person conclusively presumed to have been wholly dependent for support upon the deceased employee, and the question whether such widow was actually dependent in whole or in part upon her husband at the time of his death must be determined under St. 1911, c. 751, Part V, § 2, and the last paragraph of clause (c) of St. 1914, c. 708, § 3.

Evidence, that an employee living continuously in this country for six or eight years before his death during that time sent to his wife living in a foreign country sums of money amounting in all to \$161, there being nothing to show the circumstances of the wife nor whether she had other and independent means of support, does not warrant a finding that such wife was wholly dependent upon the earnings of her husband for support at the time of the injury that caused his death.

Whether the provisions of the workmen's compensation act relating to the death of employees were intended to benefit widows or other dependents living in a foreign country and having no domicile in this Commonwealth, here was referred to as a question that was not raised and consequently was not considered.

A deposition of a claimant for compensation as a dependent under the workmen's compensation act is competent evidence upon the question of the dependency of the claimant, and the weight to be given to it is to be determined by the arbitration committee and the Industrial Accident Board.

In support of the claim of an alleged dependent widow under the workmen's compensation act living in a foreign country, post office records are admissible in evidence to show that the deceased employee purchased money orders payable to his wife.

Under St. 1912, c. 571, § 5, providing that "The failure to make a claim [under the workmen's compensation act] within the period prescribed by section fifteen [six months after the injury] shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause," the fact, that the widow of a deceased employee, who makes a claim as his dependent, resides in Italy, does not in itself warrant a finding that there was reasonable cause for her failure to file her claim within six months after the injury to her husband that resulted in his death.

Whether the requirement of the workmen's compensation act, that a claim under the act must be filed within six months after the occurrence of the injury to the employee, is one that can be waived by the insurer, here was spoken of as a question which it was not necessary to decide in the present case.

CROSBY, J. This is an appeal from a decree of the Superior Court * confirming the decision of the Industrial Accident Board. The arbitration committee found as a fact that the widow of the deceased employee was wholly dependent upon her husband for support at the time of his death. This finding is affirmed and adopted by the Industrial Accident Board on review.

The board also found that "the failure to file a claim for compensation within the period prescribed by Part II, § 15, was occasioned by reasonable cause, due to the delay in obtaining the necessary authorization from said widow, who resides in Italy." As all the material evidence is reported, the findings of the board must stand if there is any evidence to support them. *Pigeon's Case*, 216 Mass. 51.

1. There was evidence that the deceased, a native of Italy, had been in this country for about eight years before his death, and had remained here continuously during that time; that he had a wife in Italy to whom he sent money at different times by mail. There is no evidence that his wife ever had been in this country. Still it appears from a copy of the certificate of his marriage, printed on page 13 of the record, that he was not married until October, 1909, only six years before the hearing. This circumstance is not referred to and does not seem to have been considered either by the arbitration committee or the Industrial Accident Board, nor is it raised by the insurer.

The accident which resulted in the death of the employee occurred on August 14, 1914. By St. 1914, c. 708, § 3, which took effect June 25, 1914, it is provided that "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee. (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the Industrial Accident Board shall find the wife was living apart for justifiable cause or because he had deserted her." If a widow is entitled to recover under this provision of the statute, such recovery is for total dependency and a finding for

* Entered by order of *Wait*, J.

partial dependency thereunder could not properly be made. A finding that the claimant in this case was living with her husband at the time of his death would not be warranted. *Nelson's Case*, 217 Mass. 467. *Newman's Case*, 222 Mass. 563. There is no evidence in the record to justify a finding that she was living apart from her husband for justifiable cause or that he had deserted her. It follows that she is not entitled to compensation under clause (a) of St. 1914, c. 708, § 3. The board should have determined as a fact whether the widow was actually dependent in whole or in part upon her husband at the time of his death under St. 1911, c. 751, Part V, § 2, and the last paragraph of clause (c) of St. 1914, c. 708, § 3. *Newman's Case*, 222 Mass. 563. *Gallagher's Case*, 219 Mass. 140. *Nelson's Case*, 217 Mass. 467.

There was evidence that the deceased had sent his wife at different times various sums of money amounting altogether to \$161. There is no evidence to show that he had contributed anything else to her support during the eight years preceding his death. There is nothing to show the circumstances of his wife or whether she had other and independent means of support or otherwise. In other words, there is an entire absence of evidence upon this question. The burden of proof rests upon the claimant, and, in view of the state of the evidence, we are of opinion that the finding of the board that she was wholly dependent cannot be sustained. *Buckley's Case*, 218 Mass. 354. *Welch v. New York, New Haven, & Hartford Railroad*, 176 Mass. 393. *Houlihan v. Connecticut River Railroad*, 164 Mass. 555. *Hodnett v. Boston & Albany Railroad*, 156 Mass. 86.

The evidence shows that the widow never has been a resident of the United States, either in fact or by relation to her husband, as it does not appear that he was a naturalized citizen. The question whether the death sections of the workmen's compensation act were intended to benefit widows and dependents who live in foreign countries having no domicile within the Commonwealth has not been raised, and we do not consider it. *Nelson's Case*, 217 Mass. 467. *Mulhall v. Fallon*, 176 Mass. 266. *McGovern v. Philadelphia & Reading Railway*, 235 U. S. 389. *Davidsson v. Hill*, 2 K. B. [1901] 606. *Krzus v. Crow's Nest Pass Coal Co. Ltd.* 6 B. W. C. C. 271.

2. The deposition offered by the claimant was competent upon

the question of dependency. The weight of the evidence was for the committee. The objection to its admission cannot be sustained.

3. The evidence as shown by the post office records that the deceased had purchased money orders payable to his wife were clearly admissible upon the question of her dependency.

We do not perceive any error in the admission or exclusion of evidence.

4. The act provides in substance that no proceedings for compensation shall be maintained until notice shall be given to the association or subscriber as soon as practicable after the injury, and unless the claim for compensation shall have been made within six months after the occurrence of the same; "or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity." It is also provided by § 18 that "Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury." In this case there was evidence that the association and the subscriber had notice of the injury.

The claim for compensation is required to be in writing which shall include the requirements contained in § 23 of the act as amended by St. 1912, c. 571, § 5. This section as amended provides that "The failure to make a claim within the period prescribed by section fifteen shall not be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause." See *Bloom's Case*, 222 Mass. 434. The record shows that the claim in this case was not filed within six months after the death of the employee, but the board finds that such failure "was occasioned by reasonable cause, due to the delay in obtaining the necessary authorization from said widow, who resides in Italy." It does not appear that any evidence was presented to the arbitration committee upon this question, and the committee made no finding with reference thereto. At the hearing before the Industrial Accident Board on review no new evidence was introduced, so it is apparent that the board made this finding without any evidence on the subject. For this reason we are of opinion that the finding was not warranted. Whether there is evidence to show that the delay was for the reason stated or for

any other reason does not appear. In the absence of any evidence tending to show that the failure to file the claim within six months was occasioned by mistake or other reasonable cause, it is plain that these proceedings cannot be maintained. There is no evidence to show that the insurer waived this requirement of the statute, if it could be so waived, which we do not deem it necessary to decide.

The finding of the board that the proceedings "were prosecuted [defended] without reasonable ground" and the order that the entire costs of the proceedings are to be paid by the insurer were not warranted for obvious reasons.

The act as amended provides that "No party shall as a matter of right be entitled to a second hearing upon any question of fact." Sts. 1911, c. 751, Part III, § 10; 1912, c. 571, § 13. And where there has been a full trial upon the questions at issue, a rehearing should not be granted but a final decree should be entered. *Doherty's Case*, 222 Mass. 98.

In view of what has been said, we are inclined to the opinion that the ends of justice may require a further hearing. Therefore, the case is to be recommitted to the Industrial Accident Board, where the dependent may move for a hearing and the introduction of further evidence. If the motion is granted and upon further hearing new facts are shown, the case should be considered anew. Otherwise, a finding must be made in favor of the insurer.

So ordered.

A. L. Richards, for the insurer.

H. A. Weymoth, for the dependent.

ANDREW L. POLLOCK vs. AGNES D. POLLOCK.

Middlesex. January 12, 1916. — March 7, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Trust, Resulting. Husband and Wife. Fraud. Wrongdoer without Remedy. Words, "Obligation," "Creditors."

In order that a husband may establish a resulting trust in real estate purchased in the name of his wife, he must prove that he furnished either the entire consideration or a specific and definite part of it for which he should receive a de-

terminate fraction of the property conveyed, and he further must show that it was not intended at the time of the conveyance that the wife should take a beneficial interest in the property by way of gift.

Where real estate was purchased in the name of a wife and was paid for in part from a deposit in a savings bank to which both the husband and the wife had contributed for family use, in part from money furnished by the husband and in part by means of a mortgage on the real estate for which the wife alone signed the mortgage note, which remained unpaid, and where the intention of the husband was that his wife should take and hold the title to the property for their joint benefit and that of any children they might have, the husband cannot establish a resulting trust for his benefit in the real estate or in any part of it.

Where a husband caused the title to real estate to be taken in the name of his wife because "he wished to prevent these premises from being taken for his obligation" to existing creditors, this affords him no ground for establishing a resulting trust in the property conveyed.

The fact that a conveyance was fraudulent as to creditors is no ground for avoiding it between the parties.

BILL IN EQUITY, filed in the Superior Court on March 16, 1914, seeking to establish a resulting trust in favor of the plaintiff in certain land and the buildings thereon on Lewis Avenue in Arlington standing in the name of the defendant, the wife of the plaintiff, and praying that the defendant be ordered to convey the real estate to the plaintiff and to refrain from disposing of it otherwise.

The case was heard by *Wait, J.*, who found the facts that are stated in the opinion and ordered that the bill be dismissed without costs. From a final decree entered in pursuance of this order the plaintiff appealed, and the judge, at the plaintiff's request, made a report under R. L. c. 159, § 23, of the material facts found by him.

J. J. Scott, for the plaintiff.

W. R. Buckminster, (*A. J. Wellington* with him,) for the defendant.

PIERCE, J. From the findings of fact it appears that on October 9, 1907, the plaintiff, with the assent and approval of his wife, the defendant, took title in the name of his wife to the real estate upon which, in his bill, he seeks to have impressed a resulting trust in his favor. The consideration paid for the conveyance was \$3,000, which was made up of and had its source in money on deposit in the name of the wife in a savings bank, in cash directly furnished by the husband and from the avails of a note, signed only by the wife, which note was secured by a mortgage upon the

real estate conveyed and which does not appear ever to have been paid. The money on deposit in the name of the wife in amount was \$1,057.22. Of that sum, \$525 represented \$486 with accumulated interest, which the wife on her marriage in 1904 brought to the husband as her "dowry." This "dowry" does not appear ever to have been given to the husband for his sole use but was intended by both husband and wife to be used for the family. Its deposit in the savings bank in the name of the wife was made at the suggestion of the husband and was for convenience in its use. Both "intended the property to be held for their joint use."

To establish a resulting trust the husband must prove that he furnished himself the entire consideration or a specific and definite part thereof, for which it was intended he should receive a determinate and fixed fraction of the whole estate conveyed. *Bailey v. Hemenway*, 147 Mass. 326. *Skehill v. Abbott*, 184 Mass. 145. In addition, the evidence must be clear that it was not intended at the time of the conveyance that the wife should take a beneficial interest in the property by way of gift, settlement or advancement. *Cairns v. Colburn*, 104 Mass. 274. *Edgerly v. Edgerly*, 112 Mass. 175. *Patterson v. Patterson*, 197 Mass. 112.

Considering the fact that the deposit in the savings bank was intended by husband and wife to be for family use, that both intended the property when conveyed to the wife to be for their joint use and that the note signed by the wife is outstanding and unpaid, the inference cannot be drawn that the entire consideration was paid by the husband with his own money or with money lent or given to him by his wife, nor can it be found that he furnished a distinct part of the consideration of his own money or of money lent or given to him by his wife with the intention to receive of the estate a share equivalent to the ratio the sum paid bore to the whole consideration.

The only reasonable inference is that while the husband did not intend to make a gift to the wife which would deprive him of all benefit thereof, he did intend that the wife should take and retain title for her own benefit, for his benefit and for the benefit of such family as might be given to them.

The stipulation waiving all right to the \$525, filed since the decree, can have no retroactive effect in the determination of the question before us.

The facts disclose a further difficulty in the way of the plaintiff maintaining his bill. He was engaged in a business that exposed him to suits, and shortly before taking the conveyance in the name of his wife he had been sued, his property was attached and he was compelled to give a bond to discharge the attachment. "He wished to prevent these premises from being taken for his obligation — and this influenced him in having the title taken in her name."

The word "obligation" as above used must be taken to mean that there were present existing legal rights in third persons which it was the duty of the plaintiff to discharge and which if he did not might ripen into judgments. The finding of fact that there was an intent to place the property conveyed beyond the reach of creditors must be taken to have been warranted in the absence of testimony from which it may be seen that the conclusion was clearly wrong. The word "creditors" as used in this finding must be read in connection with the previous finding that the plaintiff wished to prevent these premises from being taken for his existing obligation, and we are not required to determine whether the facts warranted the inference of a specific intent to defraud future creditors and others within the meaning of St. 13 Eliz. c. 5. See *Livermore v. Boutelle*, 11 Gray, 217; *Lyons v. Urgalones*, 189 Mass. 424.

A conveyance fraudulent as to creditors is good between the parties, but "neither party can change the effect of the conveyance, as between themselves, by appealing to the purpose of either in reference to creditors." *Lufkin v. Jakeman*, 188 Mass. 528, 532. 20 Cyc. 621.

Decree dismissing bill affirmed.

JOHN WALSH, administrator, vs. TURNER CENTRE DAIRYING
ASSOCIATION.

Suffolk. January 14, 1916. — March 7, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Employer's liability. Workmen's Compensation Act. Elevator.

If a milk dealer employs a servant to deliver milk on premises not belonging to the employer or within his control, and such servant is injured by falling down an elevator well in a building to which he was sent by his employer to deliver milk, the servant can recover from his employer for such injuries only by showing that the place was dangerous and that the employer had knowledge or reason to know of the danger and reason to believe that the servant was ignorant of it.

The provision of St. 1911, c. 751, Part I, § 1, that in an action to recover damages for personal injury sustained by an employee in the course of his employment it shall not be a defence, that the employee was negligent, that the injury was caused by the negligence of a fellow employee or that the employee had assumed the risk of the injury, has no bearing on what constitutes negligence on the part of an employer.

TORT by the administrator of the estate of John J. Walsh for the conscious suffering and death of the plaintiff's intestate on November 23, 1914, caused by his falling down an elevator well while in the employ of the defendant when delivering milk in a building on the corner of State Street and Commerce Street in Boston. Writ dated December 5, 1914.

The original declaration contained two counts. The defendant demurred, the demurrer was sustained and the plaintiff amended his declaration by adding a third and a fourth count. The defendant demurred to the third and fourth counts, the demurrer was sustained and the plaintiff amended his declaration by adding a fifth, a sixth, a seventh and an eighth count. The defendant then demurred to these counts. The substance of the allegations is stated in the opinion.

The case was argued on the last demurrer before *Morton, J.*, who sustained the demurrer and ordered judgment for the defendants. The plaintiff appealed.

St. 1911, c. 751, Part I, § 1, is as follows: "In an action to

recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence: 1. That the employee was negligent; 2. That the injury was caused by the negligence of a fellow employee; 3. That the employee had assumed the risk of the injury."

E. M. Shanley, for the plaintiff.

A. L. West, (*A. M. Pinkham* with him,) for the defendant.

PIERCE, J. The plaintiff has waived the counts numbered one, three, five and seven. The only question now presented is whether the remaining counts, when considered singly or collectively, state upon well pleaded facts a cause of action in tort for the conscious suffering of the intestate preceding his death.

The facts as stated in one or all of the counts disclose that the intestate was on the day of his injury, November 23, 1914, in the employ of the defendant as a servant to deliver milk as he might be sent on premises not stated to be of the defendant or within its control; that on November 23, 1914, the intestate was sent to deliver milk in a building on State and Commerce streets in Boston; that while so engaged he was precipitated into a certain opening or elevator well in that building of which the intestate was ignorant and of which the defendant knew or should have known by the exercise of due care, and that the defendant was not a subscriber under St. 1911, c. 751, or any act in addition thereto or in amendment thereof.

It is to be observed that no one of the counts states facts from which it may be seen or inferred that the opening or elevator well was dangerous in itself by reason of improper construction, situation, want of safeguarding or absence of light.

Nor are any facts stated from which it may be seen or inferred that the dangers attendant upon its situation or use, if such there were, were not open, obvious and apparent to ordinary even casual observation.

Where the dangerous condition of place or thing is upon the premises of the master, the duty to warn exists as a legal obligation when the danger is not obvious and when the master knows or should know the danger and of the ignorance of the employee. *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153. *Pembroke v. Cambridge Electric Light Co.* 197 Mass. 477. If the danger be ob-

vious the master owes no duty to warn, at least unless he should have actual knowledge of the servant's ignorance of the danger.

Where the danger incident to the employment is upon premises of a person other than the master, over which the master has neither right nor power to exercise authority or control, the master owes no duty other than to warn his servant of the danger if he, the master, has actual knowledge of the dangerous condition and also has reason to believe the servant is ignorant thereof. *Hughes v. Malden & Melrose Gas Light Co.* 168 Mass. 395. *Moynihan v. King's Windsor Cement Dry Mortar Co.* 168 Mass. 450. *Regan v. Donovan*, 159 Mass. 1. *O'Malley v. New York, New Haven, & Hartford Railroad*, 210 Mass. 344.

If the danger be open and obvious to the ordinary inspection of the servant, the servant's mere ignorance of the dangerous situation or condition does not enlarge the master's duty. *Gleason v. Smith*, 172 Mass. 50.

Demurrers were filed to the several counts allowed in amendment to the count numbered two in the original declaration, collectively taken to be intended to state a single cause of action, specifically pointing out the objections thereto as required by R. L. c. 173, § 14. The plaintiff has not met the specific objections by amendment to his declaration. The final demurrer was therefore rightly sustained, unless within the counts all facts necessary to establish the cause of action intended to be brought are set out with substantial certainty.

Upon the state of facts here disclosed, the plaintiff must allege and prove, not as a matter of form but of substance, that the dangerous place was a situation or condition not actually or constructively obvious to the intestate and that the defendant either had control of the premises upon which the opening or well was or had actual knowledge of the intestate's peril.

The plaintiff's contention is in substance that the defendant's duty and obligation were enlarged by St. 1911, c. 751. But that act takes away some of the employer's defences. It does not transform conduct theretofore lawful on the part of the employer into negligence. *Ashton v. Boston & Maine Railroad*, 222 Mass. 65.

Judgment affirmed.

CHARLES J. MCINTIRE, Judge of Probate, vs. PATRICK H. CONLAN
& others.

Middlesex. January 25, 1916. — March 7, 1916.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Executor and Administrator, Liability on bond. Bond, Of executor or administrator. Fraud, As against creditors.

In an action on the bond of an administrator, where the declaration alleges that the plaintiff as a creditor of the intestate has recovered judgment for his debt against the administrator, that the administrator has neglected upon demand made by the plaintiff to pay the debt to the plaintiff or to show sufficient goods or estate of the intestate to be taken on execution for that purpose, it is right for the trial judge to refuse a request of the defendant, opposed by the plaintiff, to order the removal of the case to the jury waived list, the issues being questions of fact for a jury.

Where at such a trial the principal defendant admits that the plaintiff brought an action against him as administrator and recovered judgment for the debt and that the defendant failed to expose goods or estate to be taken in satisfaction thereof, and where it is not disputed that the amount of the judgment debt is larger than the penal sum of the bond with interest from the date of the writ, the trial judge in his discretion properly may order a verdict for the plaintiff in the penal sum of the bond with interest thereon from the date of the writ.

It is no defence to such an action on an administrator's bond for the administrator to prove that he filed in the Probate Court an account purporting to show that the assets which had come to his hands had been exhausted in the payment of charges and preferred claims, if it does not appear that such account ever was allowed by the Probate Court.

Nor is it a defence to such an action on an administrator's bond for the administrator to show that, about a month after the entry of the plaintiff's judgment and the issuing of execution thereon, the administrator filed a petition in the Probate Court representing the estate to be probably insolvent, if no further proceedings upon such petition are shown.

Where, in an action on an administrator's bond, the plaintiff in interest contends that the former administrator whose bond is in suit committed a breach of the bond in failing to institute proceedings to recover certain property conveyed by the intestate in fraud of his creditors, and it appears not only that the former administrator had knowledge of the intestate's fraudulent conveyance but also that he and one of the sureties on the bond were the fraudulent grantees, no contention of the defendants can prevail which is founded on the assumption that the former administrator was ignorant of the intestate's conveyance in fraud of creditors.

PIERCE, J. This is an action on an administrator's probate bond under R. L. c. 149, § 20, against the principal defendant and his sureties, by a creditor who recovered judgment against the administrator on January 2, 1905, in the sum of \$1,093.65. Execution was issued on January 6, 1905.

The administrator neglected upon demand to pay the judgment or to show sufficient goods or estate of the deceased to be taken on the execution.

The defendant claimed a trial by jury, and the case accordingly was tried before a jury on an assigned date, October 14, 1914, agreed to by the defendant. "When the case was reached for trial, the defendant moved that the case be removed to the jury waived list on the ground that under the statute of this Commonwealth the question whether or not there had been a breach of the bond was a question of law, and that the statute does not contemplate the trial of such an action before a jury, but before the court only." This motion was denied * and the defendant excepted.

The issue was properly one of fact for a jury, and there was no error in the refusal to transfer the case to the jury waived list.

As the principal defendant apparently admitted at the trial, as he actually does upon his brief, the facts that the creditor brought an action against him in his administrative capacity, that the creditor recovered judgment, and that the defendant failed to expose goods or estate to be taken in satisfaction thereof, it followed that there was no disputed material issue of fact, and that the judge properly could direct a verdict to be found in the penal sum of the bond. *Campbell v. Whoriskey*, 170 Mass. 63. *Donahue v. Witherell*, 203 Mass. 489, 492. The judge, however, did not pursue this course but proceeded, at the same time, to submit to the jury as an issue the question of the amount due the creditor upon the judgment which he had recovered. This he properly could do under R. L. c. 149, § 31. *Defriez v. Coffin*, 155 Mass. 203. *Hudson v. Miles*, 185 Mass. 582, 588. *Newburyport v. Davis*, 209 Mass. 126, 132.

It is not contended that the amount due the creditor upon his judgment was in dispute or that it was not larger than the penal sum of the bond and interest thereon from the date of the writ.

* By Hardy, J.

The direction of the verdict for the penal sum and interest from the date of the writ, as appears by the record, was within the proper exercise of the power of the court. *Bassett v. Fidelity & Deposit Co. of Maryland*, 184 Mass. 210, 216.

At the trial on the bond, the defendant offered evidence that he had filed in the Probate Court an account purporting to show that the assets, which had come to his hands, had been exhausted in the payment of charges and preferred claims. It was held in *Fuller v. Connelly*, 142 Mass. 227, that an account filed and allowed in the Probate Court was admissible in an action to establish a breach of the bond to show that all the assets of the estate had been used and applied with the approval of the court. It is clear that there can be no breach of a probate bond arising from expenditures made with the sanction and under the implied, if not express, direction of the Probate Court. In the case at bar no claim is made that the account offered in evidence ever was allowed by the Probate Court. *McKim v. Haley*, 173 Mass. 112, 115.

The defendant also offered in evidence the fact that about a month after the entry of the judgment and issue of execution to the above named creditor, he filed a petition in the Probate Court representing the estate to be probably insolvent. It was held in *McKim v. Roosa*, 183 Mass. 510, that a "decree of probable insolvency is not a bar," and that, to effect such result, there must be a commissioner's report and a decree on that report. In this case there is no decree of probable insolvency, no appointment of a commissioner, and consequently no report or decree thereon. All that was offered was a representation of insolvency without evidence of further action.

It appears by the bill of exceptions,* not only that the administrator had knowledge of his intestate's fraudulent conveyance,

* The facts stated in the bill of exceptions which here are referred to were as follows: The defendant Patrick H. Conlan was removed as administrator of the estate of Patrick Conlan and Thomas J. Boynton, Esquire, was appointed administrator *de bonis non* of the estate. He obtained a license from the Probate Court to sell certain real estate alleged to have been fraudulently conveyed by the intestate to his son and daughter Patrick H. and Sarah A. Conlan, and, after establishing by proceedings in the Land Court and the Superior Court that this conveyance was made in fraud of creditors, he sold the real estate and received about \$1,100 as the gross proceeds of the sale.

but that he, with one of the sureties, was the fraudulent grantee. This fact completely destroys the defendant's argument founded upon the assumption that the administrator was ignorant of the intestate's conveyance in fraud of his creditors, and that he had not committed a breach of the bond by failing to institute proceedings for the recovery of such property.

We find no reversible error in any of the proceedings.

Exceptions overruled.

The case was submitted on briefs.

J. E. Galvin & H. S. Warren, for the defendants.

C. A. Whittemore, for the plaintiff.

COMMONWEALTH vs. WILLARD M. LINDSEY.

SAME vs. SAME.

Worcester. October 4, 1915. — March 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Physicians and Surgeons. Clairvoyant. Evidence, Of intent.

At the trial of a complaint under R. L. c. 76, § 8, for practicing medicine without being lawfully authorized and registered, where the defendant assumed to be a clairvoyant and also contended that he merely sold medicines as the agent of two corporations, it is proper for the presiding judge to instruct the jury that, if the defendant was a clairvoyant and as such came within the exception contained in § 9 of the same chapter, he lawfully could not prescribe medicine for the cure of disease, even if the diagnosis of the disease and the kind of medicine prescribed were revealed to him through clairvoyance, and to leave it to the jury to say whether in selling the medicines the defendant was acting entirely as the agent of the corporations or was engaged in the practice of medicine.

At the trial of complaints under R. L. c. 76, § 8, for practicing medicine without lawfully being authorized and registered on the two days named in the respective complaints, where the defendant contends that on the days named he merely was selling medicines as the agent of certain corporations, the Commonwealth, for the purpose of showing the defendant's intent by his behavior in the course of his business, may introduce evidence of sales of medicines by him on days other than the days named in the complaints when his conduct tended to show that he was prescribing the medicines that he sold.

TWO COMPLAINTS, received and sworn to in the Central District Court of Worcester on December 21, 1914, charging that the defendant at Worcester respectively on November 24, 1914, and

November 30, 1914, unlawfully did practice medicine, not being lawfully authorized and registered as required by law.

In the Superior Court the cases were tried together before *Sanderson, J.* The evidence is described in the opinion. It was agreed that the defendant never had been lawfully registered as required by law to practice medicine.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. There is no evidence from which the jury can find that the defendant practiced medicine as alleged in either of the complaints against him.

"2. If the people who consulted the defendant believed him to be a clairvoyant and the defendant purported to treat them by that method of treatment or if he purported to ascertain their physical condition by means of clairvoyance, it is not important for the jury to decide what constitutes clairvoyance."

The judge refused to make the first ruling requested, and, as to the second ruling requested, refused to make it in its exact language and instructed the jury as follows:

"The defendant has told you how he does his business; about the corporations; what he does or does not do in regard to magnetic healing and in regard to selling medicines. You will recall all the evidence in the case. I have simply referred to some of it, but you should remember that the question in the case is whether — rather did the defendant, whether a clairvoyant, or not, for the cure, prevention or alleviation of any pain, disease or ailment of those seeking treatment from him prescribe or direct any drug or medicine with the expectation of receiving compensation therefor.

"If he did and you are satisfied of that beyond a reasonable doubt, you will find him guilty; otherwise, not guilty."

The judge then read to the jury the second ruling requested, and said, "If he confined himself to that, he is within the protection of the exception to the statute."

The judge also instructed the jury as follows: "In the first place, I want to call your attention to the fact that you have heard some testimony as to what was going on in the defendant's office and what was said and done by him on other dates before the thirtieth of November. I think one witness testified to a conversation when she began her treatment with him as early as April of that

year — of last year — and some other witness testified to what happened back in September or August, or some other month. You will recall about that. The testimony as to those previous events is not testimony on which you would be justified in convicting the defendant for anything he did on those dates. It is put in for the sole purpose of aiding you in deciding, so far as it does aid you, as to what the defendant was doing on the dates in question, namely, on the twenty-fourth day of November and on the thirtieth day of November. Unless it assists you in determining whether the things you find he was doing on those dates were practicing medicine unlawfully, as charged in the complaint, you ought entirely to disregard everything you have heard as to previous dates. If it does throw light on the facts disclosed on this date, then you can use it so far as it aids you in the matter, but you should not for any other purpose."

Later in his charge the judge said: "Now, as I understand it, the other witnesses, outside of the defendant, who has told his story, have told about things that have happened on other dates, and you understand that that is of no importance unless they help you to interpret what happened on these two days."

The jury found the defendant guilty in both cases, and the judge imposed a fine of \$300 in each case. The defendant alleged exceptions to the refusal of the rulings requested by him and to the portion of the charge which instructed the jury that they might consider the evidence as to what the defendant did on days other than November 24 and November 30.

The material portions of R. L. c. 76, §§ 8, 9, are as follows:

"Section 8. Whoever, not being lawfully authorized to practice medicine within this Commonwealth and registered as aforesaid, holds himself out as a practitioner of medicine, or practices or attempts to practice medicine in any of its branches, . . . shall, for each offence, be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for three months, or by both such fine and imprisonment. . . .

"Section 9. The provisions of the eight preceding sections . . . shall not apply to . . . osteopaths, pharmacists, clairvoyants, or persons practicing hypnotism, magnetic healing, mind cure, massage, Christian science or cosmopathic method of healing, if they do not violate any of the provisions of section eight."

The cases were submitted on briefs at the sitting of the court in October, 1915, and afterwards were submitted on briefs to all the justices.

J. W. Ramsey & S. R. Cutler, for the defendant.

J. A. Stiles, District Attorney, & *E. T. Esty*, Assistant District Attorney, for the Commonwealth.

CARROLL, J. These two complaints are for the violation of R. L. c. 76, § 8. They each allege that the defendant, on November 24, 1914, and November 30, 1914, unlawfully did practice medicine, not being lawfully authorized and registered as required by law.

1. Near the street door of the building, in which the defendant carried on his business, was the sign, "Dr. Willard M. Lindsey, Inc." This was the name of a corporation of which he was the president. He also was the president of another corporation, "The Magnetic Sanitarium Company."

Three women testified as witnesses for the Commonwealth. Each called at the defendant's office on two or more occasions. He did not permit any of them to tell him her symptoms. On each occasion he stated to them their ailments; to one of the witnesses he said, "Do not tell me what ails you. I will tell you myself. Don't tell me a thing." On the first visit each of the witnesses paid him \$2.75, receiving a bottle of medicine on which were directions, the defendant saying to one of the women, "One dollar [is] for the office call and \$1.75 for the medicine." On all other visits the witnesses paid \$1.75 and received a bottle of medicine.

One of the witnesses testified that, on one occasion she told the defendant her brother was sick. The defendant said he could help him, and she "got a bottle of medicine for her brother and paid \$2.75 for the same." The brother also was a witness for the Commonwealth. He testified that after his sister's visit to the defendant he called on him and was told to "bathe himself with witch hazel;" and "that he could get it at a grocery store." Nothing was paid by him to the defendant.

James T. Davidson, an inspector of the Worcester police, testified that on November 24, 1914, while in "a small alleyway leading to a freight elevator," from which there was a door to the defendant's office over which was a transom, he heard the defend-

ant say: "You are the next. Step in this way. You see these?" as if the defendant lifted something; he then heard a noise of "something falling as if into a tray or receptacle of some kind."

The defendant was the only witness in his own behalf. He said that the things described by inspector Davidson were "taken from the bodies of different people, they were cancers, tumors . . . gall stones and gravel stones which the medicine had taken out of people through the power which he possessed." He claimed to be a clairvoyant and magnetic healer. "People came in and sat down; that he looked at them and told them everything that had happened to them from childhood to the grave, which he had power to do, that is born in his body." On cross-examination he testified that "in selling medicine he was acting as president for the Magnetic Sanitarium Company or the Dr. Willard M. Lindsey, Inc. . . . that he charged \$2.75 for the first bottle because the first bottle of medicine cost him more than the rest to manufacture." He also said "that he had twenty-five or thirty different kinds of medicine, all of which were patented by him; that he determined what medicine . . . to give to a person by his judgment reached through clairvoyancy."

There was additional evidence, introduced by the Commonwealth, tending to prove the defendant's guilt. From this brief recital of the testimony it clearly appears to have been for the jury to decide the question, Was the defendant violating the statute by unlawfully practicing medicine?

1. There was no error in refusing the first request. If the defendant was a clairvoyant and as such came within the exception of the statute, he could not prescribe medicine for the cure of disease, even if the diagnosis of it and the kind of medicines prescribed were revealed to him through clairvoyance. *Commonwealth v. DeLon*, 219 Mass. 217. It was plainly for the jury to say whether in the sale of the medicines he was acting entirely as the agent of the corporations, or was engaged at the time in the practice of medicine.

2. The defendant's second request was not given in its exact language. The defendant's guilt or innocence was to be determined by what he actually did. It was not to be determined by what he purported to do. This request was properly refused. *Commonwealth v. Zimmerman*, 221 Mass. 184.

3. The Commonwealth elected to rely on November 24 and November 30, 1914, respectively, as the days upon which the offences were committed. Against the defendant's exception, the Commonwealth was permitted to introduce evidence of the defendant's acts and conversations on different days between April, 1913, and November, 1914.

While it is a well established rule of law, in the trial of a criminal case, that the Commonwealth is not allowed to introduce evidence of other crimes with the purpose of showing the defendant to be guilty of the offence charged, it is equally well established that evidence of other crimes and acts is admissible when they are a part of a common purpose, where the plan or scheme of the defendant is a material circumstance and when the course of the defendant's business is a matter of importance in passing on his guilt or innocence.

Where the several visits and consultations of a patient with one from whom she is receiving medicines are but parts of the same course of treatment, where the speech or conduct of the defendant on one of the occasions may be equivocal, and it is essential to determine the dominant purpose of the defendant on the day of the offence, then the conduct of the defendant on other days, and as a part of the same transaction, may be a matter of great importance, and therefore of probative value. *Commonwealth v. Dow*, 217 Mass. 473. *Commonwealth v. Robinson*, 146 Mass. 571. *Commonwealth v. Ferry*, 146 Mass. 203. *Commonwealth v. Jackson*, 132 Mass. 16. *Commonwealth v. Scott*, 123 Mass. 222. *Commonwealth v. Choate*, 105 Mass. 451. *State v. Shaw*, 58 N. H. 73. *Ferner v. State*, 151 Ind. 247.

The defendant contended that in delivering the medicine to the various witnesses he was acting, not as a practitioner of medicine, but as an agent or salesman for the Dr. Willard M. Lindsey, Inc., or The Magnetic Sanitarium Company. Assuming, as the defendant contends, that he could sell and deliver drugs and medicines without violating the particular statute we are now considering, the Commonwealth had a right to meet this defence by showing the plan and purpose of the defendant, as well as his method of business, in order that the jury might determine whether on November 24 and November 30, he was acting in the capacity of a salesman or as a physician. As sales of liquor at other times than

that alleged have been held admissible as showing the intent with which the specified liquors have been kept, so the intent with which the defendant disposed of his medicines on the days in question, whether as sales of goods to customers or as medicines prescribed by himself, might be shown by his conduct respecting people and medicines in his office on other occasions.

In a complaint for an unlawful sale of intoxicating liquors, evidence of other sales than the one relied on has been held admissible on the ground that "proof of such sales might aid in showing that the transaction relied on by the prosecution was a sale, by proving the business then and there conducted." *Commonwealth v. Sinclair*, 138 Mass. 493. The judge very carefully and accurately instructed the jury that the defendant could not be convicted for what he had done on any date except the ones relied on by the Commonwealth, and that the occurrences on these and other dates were in evidence solely for the purpose of aiding them in deciding what the defendant was doing on November 24 and November 30, 1914. A majority of the court think the exception to the charge of the judge, and the exception to the admission of evidence of what happened on other days than those relied on, must be overruled.

Exceptions overruled.

ERLE WIGHTMAN vs. HENRY M. WIGHTMAN.

Bristol. October 25, 1915. — March 8, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Termination. Equity Jurisdiction, For an accounting. Dentist. Good Will.

In a suit in equity for an accounting, it appeared that the plaintiff was a dentist and that the defendant, who was his younger brother, also was a dentist, that the plaintiff employed the defendant as his assistant at a salary of \$30 a week, that the plaintiff became insane and wholly incapable of practicing his profession, that the defendant for a time, apparently believing that the plaintiff's incapacity was only temporary, continued to practice dentistry at the same office sending out bills in the plaintiff's name and charging the plaintiff in a cash book \$30 a week for his, the defendant's, services, that after a few months the defendant,

learning that the plaintiff was not improving, began and continued to practice dentistry on his own account at the same office but wholly in his own name, that about two years and a half after the plaintiff had become insane he wholly recovered, and brought the suit in equity for an accounting. It was *held*:

1. That the insanity of the plaintiff terminated the relation of master and servant between the plaintiff and the defendant.
 2. That, as the defendant, although not bound to do so, had carried on the business on the plaintiff's account for a certain length of time, he had for this period put himself in the position of one who voluntarily takes upon himself the duties of an agent and so becomes responsible to his principal as such agent, and therefore that the defendant must account to the plaintiff for his profits during this period.
 3. But that the defendant was not bound to continue this relation indefinitely and had a right to carry on the practice of dentistry on his own account, paying the plaintiff for any of the plaintiff's machinery, tools and furniture of which he made use, and accordingly that the period for which the defendant was bound to account to the plaintiff for his profits ended when the defendant ceased to carry on the work of the office for the benefit and on account of the plaintiff.
- It seems*, that the practice of dentistry, which depends for its success on personal qualities and professional skill, has no good will that arises merely from the place where it is carried on.

CARROLL, J. The plaintiff and the defendant are brothers. From 1898 till April, 1907, the plaintiff (a dentist) practiced his profession in an office in Pawtucket, Rhode Island. The defendant, a younger brother, also a dentist, began working for him in 1898. His wages, beginning at \$10 a week, were increased from time to time, until April, 1907, when he received \$30 a week. Before this last increase "he had expressed an intention of leaving his brother and starting business on his own account. . . . But he still expressed his desire to quit and had given his brother notice that he should leave in thirty days." The exact time when this notice of the defendant was given does not clearly appear. We infer from the report of the master, that it was given either in March, 1907, when the defendant's wages were increased, or a short time before June 1, 1907.

In April, 1907, the plaintiff broke down. As the master reports, "He was evidently mentally unbalanced and utterly incapacitated to do any business that required intelligent thought." He continued in this condition for some time. "During the month of May, 1907, the plaintiff occasionally visited his office, but after that and until after the first of January, 1910, he gave no attention at all to the business, and during all that time was mentally incapable of giving any attention to it." In 1908 he was taken to

a sanitarium and later to an insane hospital. In January, 1910, he recovered, and since then his condition has been normal.

May 28, 1907, the plaintiff went before a justice of the peace and executed a deed "purporting to convey to his brother, the defendant, all his real estate and personal effects." After a few days he delivered the deed to the brother, and at this time gave him written orders to collect his money, deposited in different banks. There was no valuable consideration for this deed.

The defendant continued to practice his profession at the same office, using the materials, tools and furniture therein. "For a few months he sent out bills on the billheads then in the office in the name of the plaintiff; . . . for a few months, also, he entered upon the cash book weekly payments to himself of \$30." In January, 1910, the plaintiff being then in normal condition, demanded of the defendant a return of the property which had been entrusted to him, and an account of the work done by him in the office. The defendant delivered to him the bank books and on July 20 vacated the room in which the plaintiff previously had carried on his practice as a dentist, and in which the defendant practiced from June 1, 1907, until that date, July 20, 1910. Thereupon this bill in equity was brought.

The two brothers lived with their mother at Attleborough, the plaintiff paying the necessary family expenses as head of the family. Beginning in June, 1907, and during the plaintiff's disability, the defendant paid the expenses of the home out of his own funds, amounting to \$4,789.03.

The defendant, from money turned over to him by the plaintiff, paid for the latter's expenses while he was mentally unbalanced. The master found "that from and after June 1, 1907, there was no valid contract for services or otherwise existing between the parties." The plaintiff, on account of his condition, was obliged to give up his business, and "he made no contract with his brother as to the future conduct of the business. . . . He simply gave up and went out and his brother stayed and went on with the business." The master then states the account showing a balance due the defendant of \$105.77. The master also made the alternative finding, "If, on the other hand, it must be found, upon the foregoing facts, that the defendant was still in the service of the plaintiff, then the account between them must be stated differ-

ently and as follows:" Then follows the account, showing a balance of \$1,996.74 due the plaintiff from the defendant.

The bill alleges that the deed of May 28, 1907, was obtained from the plaintiff "by fraud and deception practiced upon the complainant, and by undue influence exerted upon the complainant by said respondent." The master made no finding on this question. His report, however, negatives any fraud on the part of the defendant, and as this question was not argued, we take it to have been waived.

The bill, however, states that the plaintiff "gave into the charge of the respondent the office and furnishings and the tools of his profession, his customers and business, for the respondent to take care of until the complainant's return to health and to the duties of his profession." The Superior Court, upon the master's report, ordered the defendant to reconvey to the plaintiff the real estate described in the deed of May 28, and to pay the plaintiff the costs of suit, taxed at \$70, and directed that the plaintiff pay to the defendant \$105.77. The case is before us on the plaintiff's appeal from this decree.*

The findings of the master show that in June, 1907, the plaintiff was insane. The contract of employment, therefore, between the parties, ended at this time by reason of the insanity of the employer. Where a relation similar to that of principal and agent exists, on the insanity of the principal the relation ceases. See *Drew v. Nunn*, 4 Q. B. D. 661. Story on Agency, § 481.

The plaintiff argues that the defendant, being in the employ of the plaintiff, upon the latter's insanity, or from June 1, 1907, until January, 1910, continued to be the agent of the plaintiff and is chargeable with the profits of the business during that time.

The defendant was employed to assist his brother in his practice as a dentist on a weekly salary of \$30. While he was in the employ of his brother, he was, strictly speaking, his servant or employee. He did not stand toward him in a fiduciary relation in the real sense of the expression. He was not an agent held to the utmost good faith. See *Randall v. Peerless Motor Car Co.* 212 Mass. 352, at page 375.

Leaving out of consideration the question of responsibility of the

* Made by *Sanderson, J.*

defendant to the plaintiff during the few months following June 1, 1907, when he charged himself with a weekly salary of \$30 and sent out bills in his brother's name; when the contract between them was ended by the insanity of the plaintiff, the defendant had the right to practice his profession on his own account. No obligation to continue the brother's business for the brother's profit rested upon the defendant because he was his brother, or because he had been in his employ. While he used the machinery, tools and furniture of the plaintiff and must pay for them, or their use, and the master has so found in his account, that fact is not enough to make the defendant, a dentist practicing his profession in his own name, responsible to the owner of the material for the profits of the business; nor does the fact that the defendant occupied the room formerly occupied by his brother make him his agent and make the business conducted by him, under his own personal supervision and management, the business of his former employer. He was contributing his own personal efforts and ability in the work of his profession and a servant or employee who has assisted another in the practice of a profession is not guilty of a breach of trust merely because he continues to practice on his own account and in his own name at the office occupied by his employer before his insanity. Even if the question were open on the pleadings, there is nothing to show that the defendant was responsible for the good will of the plaintiff. There is no finding of the master that the defendant practiced in the plaintiff's name or held himself out as his successor. As stated by Braley, J., in *Foss v. Roby*, 195 Mass. 292, at page 297, in "the practice of dentistry, the personal qualities of integrity, professional skill and ability attach to and follow the person not the place." See *Moore v. Rawson*, 199 Mass. 493; *Hutchinson v. Nay*, 187 Mass. 262.

We think in one respect there was an error. The master made no finding showing the amount of the business during the period of a few months following June 1, 1907. Nor is there any finding of the master to show when the defendant ceased to manage the office and its business for the benefit of his brother, or when he began to practice his profession on his own account. While the master does find that there was no contract between the brothers after June 1, 1907, and that the defendant was not in the service of the plaintiff after that time, and although the plaintiff may have

contemplated or intended, so far as he could, that the defendant was to carry on the business for him, the defendant did not agree to this and in no way bound himself to any such arrangement, except in so far as shown by his conduct in acting for the plaintiff during this period of a few months.

Notwithstanding the findings of the master, the acts and conduct of the defendant show that during this period when he sent out the bills in the name of his brother and charged himself with a weekly salary of \$30, he then was carrying on the work of the office for the plaintiff, and must account to him for the profits during that time. It may be the defendant thought his brother's incapacity would be temporary. But whatever his motive, he was during that period conducting the work of the office in the interest of and in behalf of the plaintiff.

The findings of the master show there was no fraud or wrong intention on the part of the defendant in acting as he did during the entire period of the plaintiff's absence. In the early part of it, the defendant was seeking to help his brother, expecting the mental trouble would be of short duration. He was not bound to do as he did. He was not compelled to carry on the business on his brother's account for any length of time; but having done so, during this indefinite period, his position is analogous to that of one who voluntarily takes upon himself the duties of an agent, and so becomes responsible to the principal as such. *Dennis v. McCagg*, 32 Ill. 429. *Salsbury v. Ware*, 183 Ill. 505. See 39 Cyc. 190.

When the defendant learned that the plaintiff was not improving and it was uncertain how long he would be incapacitated, he then had the legal right to practice his profession on his own account, solely for his own profit. He could do this, we think, without breaking faith with his former employer, or being in any way responsible to him for the income and profits.

There must be further hearing to determine the time when the defendant began to practice his profession on his own account, the returns of the office from June 1, 1907, to that time, and to state the account between the parties during this period beginning June 1, 1907, and ending when the defendant ceased to carry on the work of the office for the benefit of the plaintiff.

So ordered.

S. P. Hall, (*F. S. Hall* with him,) for the plaintiff.

C. R. Cummings, for the defendant.

MARY F. MURPHY vs. HUGH NAWN CONTRACTING COMPANY.

Suffolk. November 18, 1915. — March 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Boston Transit Commission. Negligence, In construction of subway.

The Boston Transit Commission, in constructing the Dorchester tunnel under the authority given to them by St. 1911, c. 741, and in making contracts in the name of the city for such construction under § 17 of that statute, are acting as public officers and not as servants or agents of the city.

A corporation engaged as a contractor in building a section of the Dorchester tunnel under a contract with the Boston Transit Commission as authorized by St. 1911, c. 741, § 17, has a right to use the part of the public streets necessary for the performance of its contract, but in doing so it is not relieved from the duty of using proper care in performing its contract and is liable for an injury caused by its negligence to a traveller on the highway in the exercise of due care.

Consequently such a contractor has a right in the course of its work to place a timber on the sidewalk of a street, but in doing so it must take precautions by barriers, signs or other adequate means to protect the travelling public from harm.

In an action against such a contractor for personal injuries caused by the unguarded presence of a timber or plank on a sidewalk of a public street where such construction was going on, if there is evidence that the defendant was constructing this section of the subway, that the timber or plank was the property of the defendant, that it was near a derrick belonging to the defendant, that within a few minutes after the plaintiff was injured two employees of the defendant removed the plank, and that nobody except the defendant had any timber or planks at the part of the street where the plaintiff was injured, the jury is warranted in finding that the plank was placed where it was by the servants of the defendant acting within the scope of their authority.

In the case stated above it was *held* to be a misleading error for the presiding judge to instruct the jury that, "if the plaintiff has satisfied you that the defendant placed there on the sidewalk something that was likely to have caused injury, that was a nuisance," and that "the defendant had no right to place an obstruction there;" because the defendant in the performance of its contract had a right to place an obstruction on the sidewalk if it took sufficient precautions to guard the travelling public from harm.

CARROLL, J. On the afternoon of January 6, 1914, while travelling on the northerly side of Summer Street near Hawley Street, Boston, the plaintiff was injured by falling over a plank

lying on the curbstone, close to a derrick or tool house belonging to the defendant.

At this time the defendant was building the Dorchester tunnel under Summer Street. St. 1911, c. 741.

At the close of the evidence the defendant asked the presiding judge * to rule as follows:

"6. The mere presence of the plank or joist upon the sidewalk is not evidence of negligence on the part of the defendant."

"7. The mere placing of the plank or joist upon the sidewalk did not constitute negligence on the part of the defendant."

"8. In the absence of evidence that the defendant allowed the plank to remain on the sidewalk an unreasonable length of time, its presence on the sidewalk did not constitute negligence."

These rulings were refused.

By St. 1911, c. 741, the Boston Transit Commission was directed to build this tunnel. Under § 17 the commission was authorized to make contracts for its construction, in the name of the city. Section 18 provides: "All work . . . under or near public streets and places shall be conducted, so far as may be practicable, in such manner as to leave such streets and places, or a reasonable part thereof, open for traffic between the hours of seven in the forenoon and six in the afternoon of each secular day, except legal holidays."

The building of the tunnel was a public work. The Boston Transit Commission are neither servants nor agents of the city. They are public officers. The doctrine of *respondet superior* does not apply, and the city is not liable for their negligence. *Mahoney v. Boston*, 171 Mass. 427. *Prince v. Crocker*, 166 Mass. 347.

The defendant, as a contractor engaged in carrying on this work, had the right to use part of the street, if necessary, for its performance, and this use of the street by the defendant did not, of itself, without some act of negligence, create a nuisance. Although engaged in a public work and protected therein by the statute directing the construction of the tunnel, the defendant was not excused nor relieved from the necessity of using proper care

* *Lawton, J.*

in the execution of its contract. It is liable for its negligence. This is, in effect, settled by *Moynihan v. Todd*, 188 Mass. 301. In *Howard v. Worcester*, 153 Mass. 426, where the defendant city was held not liable to a traveller upon the highway for the negligence of a contractor blasting rock in excavating for a public schoolhouse, it was said by C. Allen, J., at page 428, that, while the city is exempt, the servant himself may be responsible. See also *Butterfield v. Boston*, 148 Mass. 544, at page 546. *Mahoney v. Boston*, *supra*, decided that an employee of the Boston Transit Commission could not recover against the city under the employers' liability act for the negligent act of a superintendent while at work in the subway, for the reason that the work was a public one, performed under the requirements of the statute. This case did not decide that if an employee of an independent contractor constructing this same subway was injured by the negligence of a superintendent he would be without remedy against his employer. In *Breen v. Field*, 157 Mass. 277, where an employee brought an action against the selectmen of a town for personal injuries, Mr. Justice Morton said, speaking of the defendants' duty, "Whether they were acting as public officers or agents . . . they were bound, when they hired him [the plaintiff] to work in a particular place, to see that it was reasonably safe, and that materials were furnished to make it so, and if any injury occurred to him through their neglect in these respects, they are liable." In *Rockwell v. McGovern*, 202 Mass. 6, it was assumed that a contractor engaged in such a work is answerable to a traveller on the highway for his negligence. See also *Dickinson v. Boston*, 188 Mass. 595; *Butman v. Newton*, 179 Mass. 1.

The defendant, under the statute, had the right to place the timber upon the sidewalk, provided proper precautions were taken by barrier or signs or other adequate means to protect the travelling public. There is nothing in the evidence to show that anything was done to prevent injury and no safeguards were used to protect the public from harm.

In fact, the defendant placed its defence on other grounds. Nothing appears to show that the question presented by these requests was raised during the course of the trial. There being a complete lack of evidence, therefore, to support them, requests 6 and 7 were properly refused. The judge could have told the jury,

that the mere presence of the plank on the sidewalk, if it was sufficiently guarded and proper notice was given of its presence so that persons in the exercise of due care might have avoided it, would not be evidence of the defendant's neglect. But no such request was made.

The judge was right in refusing the defendant's eighth request. The length of time the plank remained on the sidewalk was not a material circumstance. If it was necessary for the defendant to have the plank there in carrying out the work authorized by the statute, the time it was there was of no consequence. If the execution of the work did not make it necessary to have the plank there, then the defendant had no right to obstruct public travel by placing such an obstruction upon the highway for any length of time.

There was evidence that the timber or plank over which the plaintiff fell was the property of the defendant. It was near the derrick belonging to the defendant, the defendant was building this section of the subway, and, within a few minutes after the plaintiff was injured, two employees of the defendant, so the jury could find, removed the plank. In addition to this the jury could say that no one except the defendant had any timber or planks at this part of Summer Street where the plaintiff was injured. *Murphy v. Fred T. Ley & Co. Inc.* 210 Mass. 371. The jury had a right to say, that the plank was placed where it was by the servants of the defendant acting within the scope of their authority.

There was evidence that the plaintiff was in the exercise of due care. *Sampson v. Boston*, 184 Mass. 46.

The judge said to the jury: "If the plaintiff has satisfied you that the defendant placed there on the sidewalk something that was likely to have caused injury, that was a nuisance. The defendant had no right to place an obstruction there." This statement of the judge was not strictly accurate. The defendant did have the right to place the timber upon the sidewalk, provided sufficient precautions were taken to prevent harm and injury. It was acting under a statute which gave it the right to use the street, and while it was called upon to use proper care in guarding and protecting the obstruction so that the public might be secure from injury, still the mere presence of the plank on the travelled way

was not a nuisance. Although the defendant contended that it did not obstruct the street and neither owned the plank nor placed it where it was, disclaiming all responsibility for it, we think this instruction was harmful to the defendant and erroneous, and for this reason let the entry be

Exceptions sustained.

The case was argued at the bar in November, 1915, before *Rugg, C. J., Braley, De Courcy, Crosby, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

P. D. Morris, for the defendant.

R. H. Sherman, for the plaintiff.



FREDERICK W. COLES *vs.* BOSTON AND MAINE RAILROAD.

SAME *vs.* T. STUART AND SON COMPANY.

Middlesex. January 21, 1916. — March 8, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Of railroad corporation in abolition of grade crossing, Of contractor, Invited person. *Railroad. Practice, Civil*, Rulings and instructions.

Where a railroad corporation in obeying a decree for abolishing a grade crossing is engaged in changing the grade of a private street and has employed a contractor for the purpose, and where the roadway of the private street still is barred by barriers but the sidewalk on one side of the street is open for the use of the abutters and of all persons having business with them, and where the engineer of the railroad corporation, for the purpose of marking the line of a fence, unnecessarily and negligently has driven a stake two inches square into the beaten path of the sidewalk used by such abutters, the top of which stake projects three or four inches above the sidewalk, and where for one day or for three days the railroad corporation and the contractor have left the stake thus protruding from the beaten path without guarding it or marking it at night by any barrier or light, and where a milkman, one of whose customers is an abutter on the sidewalk, after having left his team and gone on foot to the house of such customer and having delivered some milk there, at three o'clock in the morning is returning to his team and stumbles over the projecting stake, of which he has no knowledge or notice, in actions brought by him respectively against the railroad corporation and the contractor, the jury can find that the plaintiff was in the exercise of due care and that each of the defendants was negligent, and also can find the amount of the plaintiff's damages, and on such findings it is right for the presiding judge to order a verdict for the plaintiff against each of the defendants in the sum found by the jury.

In the foregoing case it appeared that, by the contract for doing the work of changing the grade of the private street, the time, manner and place of working were to be under the charge of the railroad corporation which had control and direction of the work for the purpose of complying with the decree of court addressed to it, and it was *held*, that this made the railroad corporation responsible to the travelling public for negligence on the part of the contractor.

A railroad corporation in making a change of grade ordered by a decree of court in proceedings for the abolition of a grade crossing is not protected from liability for an injury caused by its doing the work negligently on the ground that it was engaged in the performance of a public work, the abolition of such a crossing being largely for its own benefit.

A milkman who leaves his wagon and goes on foot to deliver milk at the house of a customer that abuts on a sidewalk of a private street which is open to the use of abutters, although the adjoining roadway is closed to travel, is using the sidewalk by invitation, not only when he is delivering the milk, but also after he has left it and when he is walking along the sidewalk on his way back to his wagon.

One who would be liable for an injury caused by his negligently driving a stake in the sidewalk of a private street and leaving it there at night projecting above the surface unguarded and unlighted, also would be liable for negligently driving and leaving in like manner a stake projecting in the travelled path at a point where a former fence stood on the land of an abutter adjoining the sidewalk if the presence of the stake made travelling on the sidewalk dangerous.

A judge properly may refuse to make a ruling which states correctly a principle of law if the condition of the case does not require the application of the principle.

An exception will not be sustained to the refusal of a presiding judge to make a ruling which he covered fully in substance in the instructions given.

TWO ACTIONS OF TORT by the same plaintiff, the first against the Boston and Maine Railroad and the second against the T. Stuart and Son Company, a corporation engaged in business as a contractor, for personal injuries sustained on May 6, 1913, at about three o'clock in the morning on a private way in Somerville called Village Street, by reason of the plaintiff striking his foot against a stake protruding above the sidewalk of that private way that had been placed there negligently by the defendants and negligently left there unguarded and unlighted. Writs dated November 12, 1913.

The declarations, except in the name of the defendant, were the same in the two actions. The nature of the allegations in the five counts of each of the declarations is indicated sufficiently in the fifteenth paragraph of the opinion.

In the Superior Court the cases were tried together before *Brown, J.* The evidence is described in the opinion. At the close of the evidence each of the defendants asked the judge to make various rulings, among which were the following:

"13. The plaintiff had no greater rights against the defendant than he would have against the owner of the land where his accident happened if the stake in question had been placed or allowed to remain where it was by such owner under the same circumstances as it was placed by the engineer of the defendant Boston and Maine Railroad or allowed to remain where it was by the defendant T. Stuart and Son Company.

"14. Village Street being a private way, all persons using it without the express or implied invitation of one or more of the abutting owners were mere licensees as to whom the defendant would owe no duty except not intentionally or recklessly to expose them to injury.

"15. If the jury believe that the plaintiff came upon Village Street to leave milk at the house of Mrs. McDonough, one of the abutting owners, and then, having left the milk there, for his own purposes and to suit his own convenience used Village Street as one of the public, he thereupon became a licensee in his use of Village Street and was obliged to take the street as it was."

"18. If the jury believe that the work of reconstructing Village Street was still under way at the time of the accident and that the defendant T. Stuart and Son Company had not then completed the work of preparing the sidewalk for the use of travellers, the defendant railroad owed the plaintiff no duty to make that sidewalk or that part of the street where the sidewalk later was constructed any better or safer than it was.

"19. Village Street being a private way, no further act than posting a barricade or sign with the words 'Street closed: No passing' was necessary to close the street.

"20. Since Village Street was a private way, if the jury believe that the defendant T. Stuart and Son Company had posted a sign 'Street closed: No passing' in a conspicuous place upon the street, any one then using Village Street used it at his peril.

"21. If the plaintiff, because of his daily acquaintance with Village Street, knew that the work of reconstructing the street was in progress and knew that the conditions in the street were constantly changing as the work progressed, that knowledge on his part called for the exercise by him of greater vigilance for his own safety.

"22. If the plaintiff knew or in the exercise of reasonable care ought to have known the conditions as they existed in the street, he went upon the street at his peril.

"23. If, at the time of his accident, Village Street was not graded nor fitted for public travel, the plaintiff went upon it at his peril.

"24. If, in the use of Village Street, travellers thereon were (so far as the abutting owners were concerned) licensees or trespassers, such travellers were licensees or trespassers so far as the defendant was concerned.

"25. If the jury believe that the most direct way for the plaintiff to have gone to his team on the morning of the accident was by way of Dane Street and that, instead of retracing his way on Village Street to Dane Street, the plaintiff after leaving the milk at Mrs. McDonough's for purposes of his own as one of the public used Village Street, he thereby became a licensee who had to take Village Street as it was.

"26. The abutting owner of 13 Village Street had a legal right to place and to maintain a stake like the one in question on his property line and such owner would owe no duty to any one using Village Street as regards such a stake.

"27. The defendant would owe the plaintiff no greater duty as to such a stake than the abutting owner.

"28. If the jury believe that the sign 'Street closed: No passing' was a sufficient notice to close the way, Village Street, then the plaintiff in using Village Street had to use it at his peril."

The judge refused to make any of these rulings. His charge to the jury contained the following portions to which the defendants excepted:

"Now this stake, on the evidence, apparently was driven on what was supposed to be the old fence line. Whether that is the true property line or not in my opinion in this case makes very little difference. Of course if this plaintiff was in on private property where he was not invited to be, where he had no business to be, nobody owed him any duty except not to wilfully injure him. If this stake was not in the highway, in the private way, any part of it, was a foot or two over and he got hurt over there, nobody then owed him any duty except as I shall show you later."

"Now I said in my opinion it made very little difference whether this stake was on the true property line or very near it, and by that I mean this: that if this defendant had allowed that work to go on in such a way that a well defined beaten path had been made on what was to be the sidewalk when they got through, and that reached over the property line an inch or two or these stakes were driven so near to that, whether it is in the highway or not I do not think it would make much difference if they put something there that was in the nature of a trap. Now whether they allowed that thing to go on or whether it did go on is a question of fact for you to determine. If there was a well defined path where this sidewalk now is and a stake was driven in that, then that is a circumstance you can consider because these defendants ought to have realized that somebody in the night time would come along."

In each case the judge submitted to the jury four special questions, which with the answers of the jury to them were as follows:

"1. Was the plaintiff in the exercise of due care?" The jury answered "Yes."

"2. What were the approximate cause or causes of the plaintiff's accident?" The jury answered, "He stumbled over protruding stake in beaten path."

"3. Was the defendant Boston and Maine Railroad [T. Stuart and Son Company] negligent? If you answer yes, state what that negligence was." The jury answered, "The unprotected condition of protruding stake."

"4. What are the plaintiff's damages?" The jury answered, "\$9,000."

Thereupon in each of the cases the judge ordered a verdict for the plaintiff in the sum of \$9,000; and both defendants alleged exceptions.

A. D. Hill, (*P. E. Costello* with him,) for the plaintiff.

F. N. Wier, (*J. M. O'Donoghue* with him,) for the Boston and Maine Railroad.

E. C. Stone, for T. Stuart and Son Company.

CARROLL, J. The plaintiff was injured about three o'clock in the morning of May 6, 1913, by falling over a stake about two inches square, which projected three or four inches above the sidewalk on Village Street, a private way running from Dane to Vine streets in the city of Somerville. Under a decree of the Superior

Court the first named defendant, hereinafter called the railroad, was ordered to abolish a grade crossing. St. 1906, c. 463, Part I, §§ 29, 45. In this work it was necessary to change the grade of Village Street. It contracted with the last named defendant, hereinafter called the contractor, to do the work and furnish the material. The work was begun in July, 1912, and was finished July 26, 1913.

The plaintiff was a milkman. One of his customers, Mrs. McDonough, lived on the north side of Village Street. The morning he was injured he left his team on Dane Street, went down the northerly side of the street to Mrs. McDonough's, delivered the milk, thence walked on Village Street toward Vine Street, in which vicinity his driver was to meet him. The accident happened between the McDonough house and Vine Street. The changing of the grade of Village Street began the summer before the accident, and there was some evidence that this work was practically completed in the autumn following, with the exception of the macadam surface. While the roadway was blocked by wooden horses, the work being still in progress, the sidewalk was open and was used by the residents of the street and those having business with them and to some extent by the public. The fence on the land between the street and the land abutting was removed at the beginning of the work because of the change of grade, and was not replaced at the time of the accident. There was then nothing to mark the line between the sidewalk and the adjoining property. The sidewalk in this condition was open for travel and in use during the progress of the work. The stake on which the plaintiff tripped was one of a row with intervals of fifty feet, driven by the engineer of the railroad from one to three days before the plaintiff was injured. The jury might find that the stakes were there for the purpose of locating the fence line along the northerly side of Village Street. There was evidence that the fence, when erected, was placed nearer the abutting line, by several inches, than the line indicated by the stakes. These stakes were unprotected by any light or barrier. The evidence of an assistant surveyor, formerly in the employ of the railroad, tended to show that there was no reason for such a stake as the one in question projecting above the ground merely to indicate a fence line. In answer to specific questions, the jury found that the plaintiff was

in the exercise of due care; that he stumbled over a protruding stake in the beaten path; that the defendant's negligence in each action consisted in the unprotected condition of the protruding stake, and assessed the damages at \$9,000. The judge thereupon ordered a verdict for the plaintiff in each case.

1. The residents on the northerly side of Village Street were obliged to use the sidewalk in order to reach their homes. Those having business with them, who used the way by their express or implied invitation, were rightfully there, and could recover for the negligence of a wrongdoer. *Fitzsimmons v. Hale*, 220 Mass. 461. *Curtis v. Kiley*, 153 Mass. 123.

The plaintiff passed over this same sidewalk for several months before he was injured, and during that time the walk was in fair condition, one witness saying a small roller had been run over it. The plaintiff did not see the stake and had no knowledge of it; in fact, the jury could find he knew of no change in the sidewalk since the November preceding. He did know that the changing of the grade was in progress, not yet completed, but he also knew that the sidewalk was open for travel, was in daily use, and all that remained was to lay a macadam surface. Considering the time of night, that he was travelling on what was supposed to be a "fair gravel sidewalk, the travelled part being practically about five feet, . . . quite smooth from walking on it," with no light to show him the danger and with no knowledge of it, his care, under all the circumstances, was for the jury. *Winship v. Boston*, 201 Mass. 273. The case at bar is to be distinguished from *Compton v. Revere*, 179 Mass. 413. In that case the street was not open for travel. It was in a very rough condition, the dirt had not been levelled off and it "lay as it had been dumped from the tip-carts" the December before and was absolutely unfit for public travel. It was plain, as the court said, "that the plaintiff knew all that there was to know about the condition of things."

The contract providing that the time, manner and place of executing the work, were to be under the charge of the railroad company, being done under a decree issued to it, the railroad, having control and direction of the work, was responsible to the travelling public for the neglect of the contractor. *Linnehan v. Rollins*, 137 Mass. 123. *Ainsworth v. Lakin*, 180 Mass. 397, 400. *Wood-*

man v. Metropolitan Railroad, 149 Mass. 335. *Curtis v. Kiley*, *supra*.

If the stake unnecessarily projected above the sidewalk, or was negligently placed in the line of travel, outside of the true fence line, or was so placed that people lawfully travelling on the sidewalk would have no notice of it, and it was not protected in some way, with no lights to direct the traveller, the jury could find the railroad was negligent. The stakes were placed on Village Street, according to some witnesses, three days before the accident, according to another witness, one day before. There was a lamp at Dane Street, but it did not cast a light on the place where the plaintiff fell. Lanterns had been placed at various points, but they were not burning. There was no light near the stake over which the plaintiff fell. At Dane Street there were no lanterns, and at Vine Street they were not lighted. While there were barriers around certain parts of the work in the roadway, there were none on the sidewalk. There was, therefore, sufficient evidence, in our opinion, to make the question of the negligence of each defendant a question for the jury.

The defendants contended that, being engaged in the execution of a public work under the statute and the decree of the court, the railroad, while so acting, cannot be held liable for the negligence of its servants. *Hill v. Boston*, 122 Mass. 344. Even if a corporation operating a railroad for profit can be said to be engaged in the performance of a public service and not in a commercial enterprise while carrying on the work of abolishing a grade crossing, as in the case at bar, the result of the undertaking is so clearly for the advantage of the railroad corporation in the safety of its patrons and the speed and frequency of its trains, that although the public generally are benefited in their security and convenience thereby, the railroad is not excused from responsibility for its own negligence. *Hill v. Boston*, 122 Mass. 344. *Dickinson v. Boston*, 188 Mass. 595. *Norwood v. New York & New England Railroad*, 161 Mass. 259. *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397. *Hurley v. Boston*, 202 Mass. 68. *Torphy v. Fall River*, 188 Mass. 310. *Oliver v. Worcester*, 102 Mass. 489.

2. It is true that Village Street was not a public way, and there was no public easement to be withdrawn by vote of the municipal

authorities; still we cannot rule as matter of law that the defendants performed their full duty. As we have said, the plaintiff knew, in a general way, that the repairs were going on in the street, but he had no notice or warning that stakes had been driven into the sidewalk, so as to make it dangerous. The jury might have found under these circumstances, especially when the sidewalk was in constant use, that the defendants should have done something more to protect the plaintiff and prevent injury to persons lawfully on the street. *Stoliker v. Boston*, 204 Mass. 522, at pages 533, 538. *Torphy v. Fall River*, *supra*. *Hurley v. Boston*, *supra*.

3. The fifteenth and twenty-fifth requests of the railroad were properly refused. The plaintiff was invited, at least impliedly, to enter the premises of his customers and to use the street in so doing. While departing from the premises he was still protected by the invitation; nor did he become a licensee because instead of retracing his steps he went toward Vine Street, for there was evidence that when the bridge was closed it was necessary for him to go through Village Street to the Vine Street end and "rejoin his team by crossing over the fields." *Weldon v. Prescott*, 187 Mass. 415, is not in point. There the plaintiff entered the private way as one of the public as a licensee and was such when he was injured.

4. One of the defendants' contentions was that the plaintiff was not on Village Street when injured; that he was then traveling on private land adjoining Village Street, the stake being on the line of the old fence. There was evidence that the line of the stakes, over one of which the plaintiff fell, was in the travelled path, within what was known as Village Street and outside of the old fence line. Even if the stakes were on the line of the old fence, and their presence made travelling on the sidewalk dangerous, the defendants could be found to have been negligent. *McIntire v. Roberts*, 149 Mass. 450, 452. *Cavanagh v. Block*, 192 Mass. 63. *Mellen v. Morrill*, 126 Mass. 545. We see no error in the refusal of the judge to give the requests nor in the instructions given on this branch of the case.

5. We do not think the judge was obliged to give the thirteenth, twenty-fourth and twenty-sixth rulings of the defendants. "The judge is not required to state principles of law, even if correct

and asked to do so by counsel, unless the condition of the case requires it." *Howes v. Grush*, 131 Mass. 207, 211.

6. The fourteenth request was properly refused, it being undisputed that the plaintiff was a milkman, delivering milk to one of the abutters. He was not, therefore, a mere licensee. *Cavanagh v. Block*, *supra*.

7. The sixteenth and seventeenth requests were given in substance. The jury were told that the plaintiff could not recover, if on private property where he had no right to be and where he was not invited.

8. We think the judge properly instructed the jury on the rights of the parties, and the eighteenth request was properly refused. The plaintiff does not complain of the fact that the street was undergoing repairs or that stakes were used. He says, the defendants were negligent in the way they used the stakes, in failing to protect them by barriers, lights or guards or warning him of the danger.

9. The nineteenth and twentieth requests were properly refused. The defendants neither intended nor attempted to keep the sidewalk closed. The purpose of the barrier was to keep the roadway closed, and the jury could find the sidewalk was open for travel. In addition to this, there was some evidence that no "horses" were used at the Dane Street entrance. *Torphy v. Fall River*, *supra*.

10. The twenty-first, twenty-second and twenty-third requests were properly refused. The judge fully instructed the jury on the question of the plaintiff's care. The defendants were not harmed by the failure to give these requests as asked.

11. Requests twenty-five and twenty-seven have already been discussed, but the jury found in answer to a question that the stake was in the beaten path, and in view of this finding the requests are now immaterial.

12. We think there was no error in refusing the twenty-eighth request.

13. The exception to the judge's charge must be overruled. We have already discussed the question of the fence line and the position of the stakes. The finding of the jury renders any error, if there was such in the charge, immaterial.

14. The testimony of Harmon, which was admitted subject to

the defendants' exception, was afterwards stricken out. The evidence of Fitzpatrick was admissible. It was offered for the purpose of identifying the place and the changes which occurred between the date of the accident and the nineteenth day of May.

15. The contractor argues that the plaintiff was not entitled to recover on the first or second count of his declaration. We think these counts, fairly construed, mean that the stake was driven into the sidewalk and allowed to remain there by reason of the negligence of the defendants, and there was evidence to sustain them. We also think the plaintiff was entitled to go to the jury on the third, fourth and fifth counts. Even if the stake were driven by an employee of the railroad, this does not excuse the contractor. In the contract it assumed all responsibility for injury.

After certain questions were answered, the judge ordered a verdict for the plaintiff. The contractor argues this was error, because the jury did not make a specific finding that it was negligent.

The second question submitted to the jury was, "What was the proximate cause or causes of the plaintiff's accident?" To which the jury answered, "He stumbled over protruding stake in beaten path."

The third question, "Was the defendant T. Stuart and Son Company negligent? If you answer 'Yes,' state what that negligence was." To this question the jury answered, "Unprotected condition of protruding stake." The contractor says there is no answer "Yes" to the question. The jury, in the finding that the protruding stake was unprotected, assumed and found the contractor was negligent. They could not have found what the negligence was, as they did specifically, unless the contractor's negligence was involved.

It follows that the defendants' exceptions must be overruled in each case.

Exceptions overruled.

DAVID B. GODFREY vs. OLD COLONY STREET RAILWAY COMPANY.

ROBERT M. WOOD vs. SAME.

Norfolk. January 24, 1916. — March 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE,
& CARROLL, JJ.

*Evidence, Materiality, Competency. Practice, Civil, Exceptions, Conduct of trial.
Negligence, Street railway.*

In an action against a street railway corporation for personal injuries sustained in consequence of a collision between a car of the defendant and a coach in which the plaintiff was a passenger, which occurred on a square in a city crossed by intersecting streets, it is proper for the presiding judge to permit witnesses for the plaintiff to testify, against the defendant's exception, that cars of the defendant always stopped at this square even when there were no passengers to get on or off, the fact of the stopping having a tendency to show, in the absence of evidence to the contrary, that such stopping was because of the danger from the intersecting streets and to protect travellers on the highway.

In the same case a witness for the plaintiff testified that the car of the defendant was "going at a very good rate" and, when asked by the plaintiff's counsel what he meant by a "very good rate," answered, "Well it was going so fast that a man could not cross the track at the rate it was going." The defendant's counsel asked to have this answer stricken out. The judge allowed it to stand and the defendant excepted. *Held*, that the exception must be overruled, as it did not appear that the defendant was harmed by the answer of the witness, which was of no significance as tending to show the rate of speed at which the car was moving.

In the same case it was *held* that evidence in behalf of the plaintiff was admissible to show that the car was late, from which and other circumstances in the case it might be inferred that the motorman in striving to make up lost time was going at an unusual rate of speed; and it also was *held* that evidence was admissible to show that the trolley came off before reaching the place of the accident, this tending to explain a cause of the delay.

In the same case the presiding judge refused to allow the defendant to ask the plaintiff, who was in the employ of a manufacturer, whether after the accident he received a pension from his employer. The defendant made no offer of proof showing what answer he expected. *Held*, that sufficient facts did not appear on the record to show that the evidence was admissible, and an exception to its exclusion was overruled.

In the same case there was evidence that the coach was struck "near its front wheels, turning the coach end for end and overturning it," that the nearer end of the coach was ten feet from the track after it landed and that "the driver was thrown from his seat over the coach." A witness for the plaintiff was allowed, against the defendant's exception, to testify that his father, who was driving the coach at the time of the accident, was killed by the collision. *Held*, that, in the absence of anything to show that this evidence was introduced for the pur-

pose of creating a prejudice against the defendant on a collateral issue, it was admissible in connection with the other evidence as tending to show the severity of the impact.

Where a party to an action has excepted to the admission of certain evidence, otherwise competent, on the ground that it tends to create a prejudice against him on a collateral issue, the burden is upon him to disclose in his bill of exceptions sufficient evidence to show that the evidence objected to by him was introduced in such a way or at such a time as to demonstrate its purpose to arouse prejudice. In the same case the motorman who was operating the car at the time of the accident was a witness for the defendant, and the plaintiff in order to contradict him introduced parts of his testimony given at the inquest upon the death of the driver. The defendant, on redirect examination, asked him, "Did you realize that the inquiry at the inquest was whether or not you were to blame for the death of" the driver? The defendant's declared purpose in asking this question was to show that the witness at the inquest was under a severe mental strain and that the contradictions in his testimony were to be attributed to that fact. The judge excluded the question, subject to the defendant's exception. *Held*, that it could not be said that the exclusion of the question was a wrongful exercise of discretion.

CARROLL, J. These two actions were tried together. The plaintiffs suffered injuries as the result of a collision between a coach in which they were passengers and a car of the defendant. The plaintiffs recovered verdicts.*

1. The collision occurred at Newcomb Square, Quincy, where Quincy Avenue is crossed by Howard Street. Several witnesses were permitted to testify, against the defendant's exception, that the cars of the defendant always stopped at Newcomb Square. This evidence had some tendency to show that it was the practice of the defendant to stop its cars at this place, and that this practice was established in the interest of public safety. If this were true, then the defendant's violation of the usage was a departure from the standard of safety which it had itself adopted. The evidence tended to show that the cars always stopped at this place, independent of whether there were passengers to get on or off, and, while there was nothing to show the particular purpose for which the cars stopped at this point, in the absence of evidence to the contrary the jury could say that it was because of the danger of the intersecting streets and to protect travellers on the highway. *Cross v. Boston & Maine Railroad*, ante, 144. *Stevens v. Boston Elevated Railway*, 184 Mass. 476. *Floytrup v. Boston & Maine Railroad*, 163 Mass. 152.

* The cases were tried together before *McLaughlin, J.* The defendant alleged exceptions.

2. A witness for the plaintiff in direct examination said the car was "going at a very good rate." When asked by the plaintiff's counsel what he meant by a "very good rate," he replied, "Well, it was going so fast that a man could not cross the track at the rate it was going." The defendant asked to have the answer stricken out. The judge permitted it to stand. The answer of the witness conveyed very little, if any, information indicating the speed at which the car was moving. To say, that a person could not cross the track in front of a moving car, did not, in our opinion, tend to show the speed at which it was moving and we do not think the defendant was harmed by the answer.

3. The evidence showing that the car was late was admissible. The jury might infer from this fact, together with the other circumstances in the case, that the motorman was striving to make up lost time and was going at an unusual rate of speed. *Spooner v. Old Colony Street Railway*, 190 Mass. 132. And, as bearing on this point, the testimony of Godfrey, Hollis and McDougall was admissible. The testimony of the two former witnesses tended, although slightly, to show that the car was late, and the evidence of McDougall that the trolley came off the car before reaching the scene of the accident was admissible. This bore upon the cause of the delay.

4. The inquiry of the plaintiff Godfrey, whether he received a pension from his employer, the Fore River Ship Building Company, following his injury, was excluded. No offer of proof was made by the defendant showing what answer it expected. *Wright v. Chelsea*, 207 Mass. 460. While the diminished earning capacity of the witness was a material circumstance bearing on the question of damages, and without deciding whether a pension may not under some conditions be a material fact bearing on this issue, sufficient facts do not appear on the record to warrant us in saying that the evidence was admissible.

5. A witness, against the defendant's exception, was permitted to testify in substance that his father, who was driving this coach, was killed as a result of the collision. The defendant argues that such evidence created a prejudice against it, drawing away the minds of the jury from the real issue to its harm and injury. If the evidence was introduced for any such purpose, it was highly prejudicial. It was unfair, it was a wrong to the defendant and

should never have been admitted. On the other hand, the plaintiff had a right to show all material facts, however great the prejudice aroused by their narration. The severity of the impact was such a fact and the circumstances following from it might be material. There was evidence showing that the coach was struck "near its front wheels, turning the coach end for end and overturning it, and the nearest end of the coach was ten feet from the track after it landed; the driver was thrown from his seat over the coach." All the evidence is not reported, but, from this brief statement of some of the facts in the case, in the opinion of the majority of the court it would appear that the evidence was admissible. If this testimony was inadmissible, either because there was no other evidence connected with it showing it to be important, or because it was introduced in such a way or at such a time as to demonstrate that its purpose was to arouse prejudice, it was for the excepting party to disclose sufficient evidence to show it was thus incompetent. *Jones v. Smith*, 121 Mass. 15. *Woodward v. Eastman*, 118 Mass. 403.

6. The motorman was a witness for the defendant. The plaintiff introduced parts of his evidence given at the inquest upon the death of the driver, in order to contradict him. The defendant, on redirect examination, asked him, "Did you realize that the inquiry at the inquest was whether or not you were to blame for the death of Mr. Hollis [the driver]?" The question was excluded. The defendant's declared purpose in asking this question was to show that the witness at the time of the inquest was under a severe mental strain and that the contradictions in his evidence were to be attributed to this fact. Something must be left to the wise discretion of the judge in such matters. The appearance and manner of the witness, the nature and the importance of the contradictory evidence are not before us, and we cannot say that there was error in excluding the question.

Exceptions overruled.

The case was submitted on briefs at the sitting of the court in January, 1916, and afterwards was submitted on briefs to all the justices.

Asa P. French & J. S. Allen, Jr., for the defendant.

D. J. Gallagher & B. H. Greenhood, for the plaintiffs.

HARRY F. PECK vs. ABBOTT AND FERNALD COMPANY.

Suffolk. March 6, 1916. — March 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Frauds, Statute of.

The mere setting apart by their seller of a carload of oats of the value of more than \$500, the seller intending to deliver the oats to a certain buyer under an oral contract of sale of which there is no memorandum in writing, there being no acceptance by the buyer, does not satisfy the requirements of the statute of frauds contained in St. 1908, c. 237, § 4.

CONTRACT for \$802.50, the price of a carload of straight clipped white oats alleged to have been sold by the plaintiff to the defendant. Writ in the Municipal Court of the City of Boston dated November 14, 1910.

The defendant in its answer, in addition to a general denial, alleged that, if any such contract was entered into between the plaintiff and the defendant, such contract was for the sale of goods of the value of \$500 or upward, as appeared from the plaintiff's declaration; that the defendant did not accept or receive the goods or any part thereof, or give something in earnest to bind the alleged agreement or in part payment thereof, and that there was no note or memorandum in writing of the alleged agreement or sale signed by the defendant or its agent in that behalf as required by St. 1908, c. 237, § 4.

On appeal to the Superior Court the case was tried before *Dubuque, J.* At the close of the evidence the plaintiff asked the judge to rule that the case was not within the statute of frauds. The judge refused to make this ruling and found for the defendant. At the request of the plaintiff the judge reported the case for determination by this court.

St. 1908, c. 237, § 4, is as follows:

"(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually re-

ceive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"(2) The provisions of this section shall apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

Section 78 of the same chapter is as follows: "Section five of chapter seventy-four of the Revised Laws and all acts and parts of acts inconsistent herewith are hereby repealed."

The case was submitted on briefs.

A. L. Stinson, for the plaintiff.

H. F. R. Dolan, J. H. Morson & J. S. O'Neill, for the defendant.

BY THE COURT. This is an action of contract to recover damages alleged to have been sustained by the breach of an oral contract, made by the defendant, to buy a carload of oats to be delivered in the future for \$802.50. There was no evidence of giving anything in earnest to bind the contract, or in part payment, by the defendant. It refused to take the goods when delivery was tendered.

The answer set up the statute of frauds. St. 1908, c. 237, § 4. The sale plainly was within its terms, and hence, unenforceable. The plaintiff seeks to avoid the force of this defence by reliance upon that part of the section, clause (1), to the effect that an oral contract of sale may be valid when "the buyer shall accept part of the goods . . . and actually receive the same," and of that part of clause (3) of the same section, to the effect that there is "acceptance" of the goods under the sales act "when the buyer,

either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." There was no "actual receipt" of the goods by the buyer. There was no evidence of its assent to become the owner of any specific goods. Such acceptance would seem to have been impossible, as the goods were sold for future delivery, and, long before the time for the delivery arrived, the transaction was repudiated by the defendant. The mere setting apart of the carload for the defendant by the seller, without more, was not an acceptance by the buyer.

Judgment for the defendant.

THOMAS M. WATSON & another, trustees, *vs.* ALICE K. WATSON & others.

Suffolk. January 18, 19, 1916. — March 9, 1916.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Trust. Power. Words, "Either."

A settlor created by deed a trust for the maintenance and support of his wife and children. He directed that, after his own death and that of his wife, the trustees upon each child arriving at the age of twenty-one years should convey and transfer to such child his or her share, and the trustees further were authorized to apply any part of the principal for the benefit of the children, when in their judgment it became necessary. By the deed of trust the settlor was given power "in and by his last will and testament to debar and prohibit either of his said children from any share or part of said trust property, the income, profits and accumulations thereof anything herein to the contrary notwithstanding." In his will, after reciting this power, the settlor provided as follows: "Now it is my will and I do debar and prohibit either of said children from receiving and I do debar and prohibit the trustees hereinafter named from paying over, conveying or transferring to either of my said children any part or share of the principal of said trust estate." The will provided that the income from the trust fund should be used for the support of the testator's widow and children and the survivor of them as directed in the trust deed and further provided as follows: "but I authorize and direct my said trustees to pay over out of the said net income, rents and profits, the sum of five thousand dollars to each of my sons on his arriving at the age of thirty years." At the death of the testator's widow there were five children living, all over twenty-one years of age, and two of them were sons, each of whom was over thirty years of age. Upon a bill by the trustees for instructions, it was *held*, that the power of revocation was a valid one and was exercised properly by the settlor; and therefore that the trust could not be terminated

until the death of the last survivor of the settlor's children and that in the meantime no child could receive any part of the principal.

Held, also, that the word "either," as used in the phrase "either of his said children" in the deed of trust, and also as used by the settlor in his testamentary exercise of the power, was used in the sense of "any," and excluded all his children from the principal of the trust.

Held, also, that the settlor had the power, which he had exercised properly by his will, to direct that \$5,000 should be paid from the income of the trust to each of his sons, and that the right of the other children to share in the income was postponed until the two payments of \$5,000 each had been made from the net income accumulated for the purpose.

Held, also, that the discretionary power given by the deed of trust to the trustees, to apply any part of the principal for the benefit of the children when in their judgment it became necessary, was revoked.

CARROLL, J. June 10, 1879, Laurence Leonard of Melrose conveyed real estate on Charter Street, Boston, to Luke Leonard who, at the same time, conveyed it to Laurence as trustee, the income therefrom to be applied to the maintenance and support of Laurence Leonard's wife and the education, maintenance and support of their children. After the death of Laurence, trustees were to succeed him and the trust was to continue until the death or remarriage of Mrs. Leonard. Upon her death or remarriage, the income was to be applied to the support, education and maintenance of the children and the "survivor and survivors of them wholly."

After the death of Laurence and the death or remarriage of Mrs. Leonard, upon each child arriving at the age of twenty-one years, the trustees were directed then to convey and transfer to such child his or her share, charging each with any advances so made from the capital to the child's benefit; and the trustees were further authorized to apply any part of the principal for the benefit of the children, when in their judgment it became necessary.

Laurence Leonard in the deed of trust was given the power to name his successors and "in and by his last will and testament to debar and prohibit either of his said children from any share or part of said trust property, the income, profits and accumulations thereof anything herein to the contrary notwithstanding."

On the same day Owen A. Galvin conveyed to said Laurence certain real estate in Melrose. The habendum clause was, "To have and to hold the granted premises with all the privileges and appurtenances . . . to the said Laurence Leonard . . . but in trust

nevertheless for the uses and purposes and with the rights, duties, powers and restrictions set forth in the deed from said Luke Leonard to Laurence Leonard dated June 10, 1879, and recorded with Suffolk Deeds."

Laurence Leonard died testate, September 20, 1888. Mrs. Leonard died intestate, November 21, 1912. At the death of Mrs. Leonard, the surviving children of Laurence Leonard were Alice K. Watson, Ellen L. Leonard, Lawrence G. Leonard, John Joseph Leonard and Mary Leonard. "There was also living Helen Watson, a minor daughter of said Alice K. Watson and the sole issue living of the children of said Laurence." On his death there was surviving one other child, Patrick F. Leonard, who died intestate February 25, 1895, unmarried, under thirty years of age, leaving no issue, no debts and his mother his sole heir at law. Mrs. Leonard never remarried. All the surviving children had arrived at the age of twenty-one when their mother died.

In addition to these trust properties, Laurence Leonard was the owner of additional property which passed by the residuary clause of his will. Mary Wren, mentioned in said clause, died previous to the death of Mrs. Leonard. The son Lawrence G. Leonard was thirty years of age January 12, 1903, John Joseph Leonard was thirty years of age March 30, 1909.

Laurence Leonard's will was dated February 21, 1888. In the fourth clause, after referring to the Charter Street and Melrose trust, it recites: "Inasmuch as it is provided in and by said deeds that I may by my last will and testament debar and prohibit either of my children living at my decease from any share or part of said trust estate, the income, profits, and accumulations thereof, anything in said trust deeds to the contrary notwithstanding. Now it is my will and I do debar and prohibit either of said children from receiving and I do debar and prohibit the Trustees hereinafter named from paying over, conveying or transferring to either of my said children any part or share of the principal of said trust estate." The will also provided that the income should be used for the support of the mother and children and the survivor of them, as mentioned in the trust deed; and further stipulated: "but I authorize and direct my said Trustees to pay over out of the said net income, rents and profits, the sum of Five thousand dollars to each of my sons on his arriving at the age of thirty years."

This is a bill for instructions.* The plaintiffs, as trustees under the Charter Street and Melrose indentures and the will of Laurence Leonard, ask:

1. Are the defendants Alice K. Watson, Ellen L. Leonard, Lawrence G. Leonard, John Joseph Leonard and Mary Leonard now entitled to have the trust terminated and the property divided among them?

2. If the answer to the preceding question is in the negative, is it the duty of the plaintiffs to withhold all the net income of the trust property until they shall have accumulated and paid therefrom \$5,000 each to the defendants Lawrence G. Leonard and John Joseph Leonard?

3. Are the plaintiffs now entitled to apply a reasonable part of the principal of the trust property for the benefit of the five defendants above named?

1. The trust deed expressly gave to Laurence Leonard the power by his will to prevent either of his children from participating in any share or part of the trust property, its income, profits and accumulations. The deeds and the power therein given were specifically referred to in his will, and in the execution of the power he clearly stated, "I do debar and prohibit either of said children from receiving and I do debar and prohibit the Trustees hereinafter named from paying over, conveying or transferring to either of my said children any part or share of the principal of said trust estate."

It seems plain that Laurence Leonard was given full power and authority by the trust indentures to debar the distribution of the estate and the termination of the trust during the lifetime of the children, and it seems equally plain that in the will, he made a valid execution of this power and clearly manifested his intention to prevent the present distribution of the principal of the estate.

In the deed of trust to Laurence Leonard he was given authority by his will to exclude either of his children from the trust estate. It is contended by the surviving children that the word "either" limited this power, so that, acting under it, the testator could not debar or prohibit all of his children, but only some one of them, and the attempt therefore to debar all his children

* Reported by *Braley, J.*, for determination by the full court.

was not a valid exercise of the power reserved. "Either" in its best and strictest usage means "one or the other of two," but there is authority for its use as "any." *Lafoy v. Campbell*, 15 Stew. 34. *Chidester v. Springfield & Illinois South Eastern Railway*, 59 Ill. 87. We think it clear, the word was used in the latter sense in the indenture of trust, and the power was therein given to the testator to exclude all of his children from the principal of the estate, which power was carried into effect by the fourth clause of his will. The same word "either" is used in both the will and the trust deed. We can see no valid reason why the right to debar should be limited to only one child. We think that in both instruments Laurence Leonard, who was in reality the settlor of the trust, uses the word "either" in the sense of "any" or "all."

Nor did the testator fail to execute the power, as argued by the children, when he prohibited the children from the principal of the estate, leaving to them the income. Having power over both, the execution was not invalid because he used it only to prevent them from participating in the principal.

It is also contended on behalf of the five children, that as the income belongs to them under the will of their father, and as they are his heirs, inheriting the remainder, and therefore the sole parties in interest, the income as well as the principal of the estate belonging to them, they are entitled to a present conveyance, and the trust under the deeds should be terminated by a decree of the court. It was the intention of the testator that his children should participate in the income. The *corpus* of the estate was not to be disturbed during their lifetime. In the absence of some rule of law or principle of public policy preventing, we must carry out his intention, and the defendants are not entitled to have the trust terminated and the property divided among them. *Clafin v. Clafin* 149 Mass. 19. *Shelton v. King*, 229 U. S. 90. There is nothing in the residuary clause of the will which conflicts with what is here stated. The answer to the first question is "No."

2. Lawrence G. and John Joseph Leonard are more than thirty years of age. The trustees were directed "to pay over out of the said net income, rents and profits, the sum of Five thousand dollars to each of my sons on his arriving at the age of thirty years." We are of opinion that the testator had the right, by his will, to direct that \$5,000 be paid from the income to each of the

sons, on arriving at the age of thirty years. On the death of the mother, the income was to go to the children, and at this time both the sons were over thirty years of age. The father, having the right to prohibit and debar the children, also had the right to postpone their enjoyment of the income until there should be accumulated from the net income the sum of \$5,000 for Lawrence G. and a like sum of \$5,000 for John Joseph. We answer the second question in the affirmative.

3. In the deed the trustees are given the authority to apply any part of the principal for the benefit of the children, when in their judgment it becomes necessary or proper. They now say it has become necessary and proper. There is no such provision in the will of Laurence Leonard, and in his will, acting under the power given him, the testator expressly debarred any of his children from any share of the principal; and by this clause in the will the discretion given to the trustees in the deed was destroyed and taken away. Our answer, therefore, to the third question, is "No."

Decree to be entered in accordance with this opinion.

So ordered.

N. N. Jones, for Alice K. Watson and others.

W. F. White, (*F. W. Johnson* with him,) for Lawrence G. and John J. Leonard, stated the case.

R. F. Sturgis, guardian *ad litem*, *pro se*.

FEDERAL COAL AND COKE COMPANY *vs.* JAMES B. CORYELL,
trustee in bankruptcy.

JAMES B. CORYELL, trustee in bankruptcy, *vs.* FEDERAL COAL
AND COKE COMPANY.

Middlesex. November 18, 1915. — March 10, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Construction, Validity. Fraud. Practice, Civil, Exceptions, New trial. Evidence, Self-serving statements.

A contract to furnish twenty-four thousand tons of furnace coke contained the following provision as to quality: "Quality. The Seller agrees to furnish the Buyer with 48 hour furnace coke made at their ovens located at Grant Town, West

Virginia, and in case the consignee finds at any time during the life of this contract that a fair average quality of the coke materially deteriorates from the quality of the coke shipped during the first one or two months of this contract, then the Buyer has the privilege to cancel any unshipped portion of this contract." A previous draft of the contract had contained a provision that "should the [consignees of the coke] at any time during the life of the contract find the coke is unfit for their blast furnace, then we have the option of cancelling any unshipped portion of the contract." The seller refused to sign the contract with this provision in it, and wrote, "I would be willing to insert in the contract a paragraph to the effect that the average quality of the coke, shipped during the first two months, be taken as a fair average sample of the coke, and subsequently should the coke be of inferior quality from said average sample, then [the consignees] would have the right to cancel same." Thereupon the contract was executed containing the paragraph as to quality quoted above. *Held*, that there was no warranty in the contract as to the quality of the coke to be delivered during the first one or two months under the contract.

In the same case it was contended by the buyer that a representation made by an officer of the seller and relied on by the buyer, to the effect that the coke would not be over 1.25 per cent in sulphur, when it turned out not to be true, justified the buyer in refusing to purchase any further coke under the contract, but it appeared that when the representation was made the seller's coke ovens were not in operation, that they were about to be started under a new management and that certain alleged analyses shown to the buyer were genuine. *Held*, that the representation was promissory in its nature and stated a reasonable expectation of the seller, and that accordingly its falsity did not entitle the buyer to avoid the contract on the ground of fraud.

An exception to the admission of certain evidence here was overruled on the ground that, even if it was incompetent, which did not appear, the substance of it already had been admitted in the examination of a previous witness, so that its introduction could not have harmed the excepting party.

Unanswered letters containing self-serving statements concerning a certain contract, written long after the date of the contract, are not admissible in evidence in behalf of the writer.

Where an action for breach of a certain contract in writing and a cross action by the defendant in the first action against the plaintiff in that action alleging a breach of the same contract were tried together, and under the rulings of the presiding judge a verdict was returned for the defendant in the first action, and the judge in the cross action ordered a verdict for the plaintiff in that action, who was the defendant in the first, and where exceptions of the plaintiff in the first action to the rulings of the judge in that action were sustained by this court, but for some unexplained reason no exception appeared to have been taken to the ordering of the verdict in the cross action, it was *held*, that, inasmuch as it appeared, in spite of this defect in procedure, that the same error was made by the judge in both actions in regard to the same issues which were tried together as one case, a new trial must be ordered in both actions.

CONTRACT, by the Federal Coal and Coke Company, a corporation, against (by substitution by amendment after bankruptcy) the trustee in bankruptcy of the firm of J. K. Dimmick and Company, who did business in Philadelphia in the State of Pennsyl-

vania, for the alleged breach of a contract in writing dated September 14, 1909, in refusing to receive and pay for any further deliveries of coke after the delivery of five hundred and forty-four tons. Writ, served by trustee process on the Malden and Melrose Gas Light Company as trustee, dated November 14, 1910; also a

CROSS ACTION by the defendant in the first action against the plaintiff in that action for an alleged breach of the same contract in failing to furnish coke of the quality called for by the contract. Writ dated January 31, 1913.

In the Superior Court the cases were tried together before *Hardy, J.* The contract sued upon, of which the fifth paragraph is quoted in the opinion, was as follows:

“Contract for West Virginia Furnace Coke.

“Agreement made this fourteenth day of September, 1909, between J. K. Dimmick and H. W. Coleman, trading as J. K. Dimmick & Company, Philadelphia, Pennsylvania, party of the first part hereinafter called the Buyer, and the Federal Coal & Coke Company, Boston, Massachusetts, party of the second part, hereinafter called the Seller.

“In consideration of the mutuality hereof, it is hereby agreed between the parties hereto as follows, viz:

“First: Quantity. The Seller hereby sells and agrees to deliver to the Buyer, and the Buyer hereby ^{purchases} _{sells} and agrees to receive approximately twenty four thousand (24,000) net tons of 2000 pounds each, of 48 hour Federal West Virginia Furnace Coke, for shipment during the year nineteen hundred and ten, as hereinafter set forth.

“Second: Price. The buyer agrees to pay for all coke shipped under this agreement at the net price of One Dollar and ninety Cents (\$1.90) per net ton of 2000 pounds f.o.b. cars ovens, on the twentieth day of each month for all coke shipped during the preceding month.

“Third: Shipments. Shipments are to be made in about equal monthly proportions of two thousand (2000) tons each, beginning January first, 1910, and continuing until December 31st, 1910.

“Fourth: Shipments of coke under this agreement are subject to fires, strikes, accidents, car supply, and any other causes beyond the control of either Buyer or Seller, applicable to either

party. It is understood and agreed if there should be a shortage of coke cars, shipments under this contract will be divided from time to time in fair proportion on all orders, whether under this or coke contracts with other parties. It is also understood and agreed that in case the blast furnaces of the consignees are out of blast entirely or partially, shipments of coke under this contract are to be made in proportion to the operation of the furnaces of the consignee, and at the expiration of this contract should there be any unshipped portion due to the above mentioned causes, same is to be cancelled.

"Fifth: Quality. The Seller agrees to furnish the Buyer with 48 hour furnace coke made at their ovens located at Grant Town, West Virginia, and in case the consignee finds at any time during the life of this contract that a fair average quality of the coke materially deteriorates from the quality of the coke shipped during the first one or two months of this contract, then the Buyer has the privilege to cancel any unshipped portion of this contract.

"Sixth: Consignee. The coke covered by this contract is to be shipped to the Wellston Steel & Iron Company, Wellston, Ohio, and the Buyer cannot change the destination of this coke without the consent of the Seller, and the Buyer is only obligated to receive such portion of this contract as will be received by the Wellston Steel & Iron Company under the exceptions as noted in Clauses Fourth and Fifth.

"Seventh: The provisions of this agreement shall extend to the heirs, executors, administrators, successors and assigns of the respective parties hereto.

"In witness whereof the parties hereto have duly executed these presents the day and year first above written.

Witness: M. R. Gano. J. K. Dimmick & Company
By H. W. Coleman

Witness: R. Grant Federal Coal & Coke Company
to E. Page. By Edward Page

Vice President."

The evidence is described in the opinion. At the close of the evidence the Federal Coal and Coke Company asked the judge to make certain rulings, of which those now material, because they were the only ones argued, were as follows:

"3. There is no evidence in the case that plaintiff made any false and fraudulent representation of an existing fact concerning the quality of its coke."

"8. There is no evidence in the case that the defendants relied on any representation of an existing fact concerning the quality of the coke at the time the contract was made."

The judge refused to make either of these rulings. In regard to the construction of the fifth paragraph of the contract he instructed the jury as follows:

"Now, in dealing with the fifth section of the contract it is my duty to construe that contract in the light of the claim that is made here by the plaintiff. It is claimed that in case the consignee finds at any time during the life of this contract that a fair average quality of the coke deteriorates from the quality of coke shipped during the first one or two months of this contract, then the buyer has the privilege of cancelling any unshipped portion of this contract. It is claimed here, as I understand, by counsel in argument on behalf of the plaintiff, that there was a duty imposed by this contract upon the defendant, or upon the Wellston Company, to use this coke or to test this coke through the period of one month or more. I do not so construe the contract. The duty is imposed upon me to construe the contract, and you have to take the construction from me. The language as used here is, that if they find at any time during the life of the contract, and so forth. Well, the word 'during' I construe to mean this: In the course of the contract, not throughout the whole time of the contract, and that is the apparent meaning of the term and that is the way I shall construe it and tell you. It says that if it is found at any time in the course of the life of the contract that a fair average quality of the coke deteriorates from the quality of coke found during the first one or two months, then the buyer may cancel the contract. Now, I construe the other language there, 'During the first one or two months,' to mean in the course of the one or two months. Now, I instruct you as a matter of law, in the construction of this contract, that the Wellston Company were not obliged to take coke during the whole month. If they found, in the course of the contract, that the average quality of coke did not come up to a certain standard or found it deteriorated, then they would be at liberty to cancel this contract.

"And I construe the words 'the average quality,' not to mean during the average of the whole month, but it means the average quality of the cars or selection from the cars, and if the Wellston Company, through its chemist, went to those cars and selected samples from several cars and combined those samples together and tested them and made an analysis, and they found there was a deterioration at any time during the life of the contract or in the course of the contract, then they would have the right to repudiate the contract.

"Now, I suppose some of you may have had some experience in building contracts, and I suppose in those building contracts you have seen the stipulation that the work must be done to the satisfaction of the architect who has perhaps supervision of the work. I suppose you understand those contracts, those of you who are acquainted with the real estate business. Now, in dealing with this contract, you have the right to consider that to the Wellston Company, to a certain extent, was confided the duty of acting as what you might call an arbiter, that they had the right to investigate the nature of this coke, that its quality was of some consideration in this case, and that if, after their investigation, after they tried it, it did not come up to what was proper by reason of the analysis, then they would have the right to cancel the contract for the future coke to be delivered. What are the facts here as testified to by the chemist? He says that the first sample taken from several cars he has tested or analyzed disclosed that the sulphur stood at 1.38 [1.35] per cent. This was out of the first shipment of coke. He says that the next analysis made with the other shipments on which tests were made, one disclosed 1.65, as I remember the figures, and the other 1.68. Now, if you find upon the facts here that there was this analysis made, that there was a deterioration in the shipments, you would be at liberty to find that there was the right on the part of the Wellston Company to cancel the contract."

In the first action, brought by the Federal Coal and Coke Company, the jury returned a verdict for the defendant, and thereupon the judge ordered in the cross action a verdict for the plaintiff in that action, the trustee in bankruptcy of J. K. Dimmick and Company, in the sum of \$1,291.19. The Federal Coal and Coke Company alleged exceptions to the refusal of the judge to make

the rulings requested by it, to his instructions to the jury in regard to the construction of the fifth paragraph of the contract and to certain rulings relating to evidence which are described sufficiently in the opinion.

F. D. Putnam, (J. A. Locke with him,) for the Federal Coal and Coke Company.

C. F. Lovejoy, for the trustee in bankruptcy.

DE COURCY, J. 1. The fifth paragraph of the contract between the Federal Coal and Coke Company (herein called the plaintiff), and J. K. Dimmick and Company (herein called the defendants), reads as follows:

"Fifth: Quality. The Seller agrees to furnish the Buyer with 48 hour furnace coke made at their ovens located at Grant Town, West Virginia, and in case the consignee finds at any time during the life of this contract that a fair average quality of the coke materially deteriorates from the quality of the coke shipped during the first one or two months of this contract, then the Buyer has the privilege to cancel any unshipped portion of this contract." The shipments were to be made in about equal monthly proportions of two thousand tons each, beginning January 1, 1910, and continuing until December 31, 1910; and the consignee was the Wellston Steel and Iron Company, to whom the Buyer (J. K. Dimmick and Company) resold the coke, under a written agreement. The contract in question was prepared by the defendants. In the first draft was inserted a provision that "should the Wellston Steel & Iron Co. at any time during the life of the contract find the coke is unfit for their blast furnace, then we have the option of cancelling any unshipped portion of the contract." This the plaintiff's representative refused to sign; and wrote "I would be willing to insert in the contract a paragraph to the effect that the average quality of the coke, shipped during the first two months, be taken as a fair average sample of the coke, and subsequently should the coke be of inferior quality from said average sample, then the Wellston Steel and Iron Co. would have the right to cancel same." And the defendants thereupon drafted the present contract.

We are of opinion that the true construction of paragraph Fifth is, that an average was to be taken of the coke shipped during the first month or two, and that such average would establish the stand-

ard up to which all subsequent shipments must measure. When early in January the Wellston Company found that samples of the coke sent to it analyzed 1.35, 1.65 and 1.68 sulphur, it stopped the shipments, acting presumably under the provision in its contract with J. K. Dimmick and Company, that "in case the Buyer finds this coke unfit for blast furnace use, then the buyer has the option on due notice to the Seller to cancel any unshipped portion of this contract." There was no such provision however in the contract between this plaintiff and defendant. It follows that the exception to the trial judge's construction of the contract must be sustained.

There was conflicting testimony as to the trade meaning of "48 hour furnace coke" as used in paragraph Fifth, some of the witnesses stating that it must be a coke that does not exceed 1.25 per cent in sulphur for blast furnace use, while others testified that it carried no guarantee of sulphur content. So far as the record shows this issue was not submitted to the jury. Putting this aside, we find no warranty in the contract as to the quality of the coke to be delivered during the first one or two months under the contract. Such omission may be due to the fact that the defendants had expected the plaintiff to sign a contract similar to that which they had with the Wellston Company containing a cancellation clause. Failing to obtain this Gano, who represented the defendants in the negotiations, apparently was content to rely upon the oral statements of Page, representing the plaintiff, as to the quality of coke it expected to ship.

2. The alleged misrepresentations of the plaintiff's vice-president, Page, relied on by the defendants, to the effect that the coke would not be over 1.25 per cent in sulphur, were promissory in nature and insufficient to entitle them to avoid the contract on the ground of fraud. As Gano knew, the plaintiff's coke ovens were not operating at the time, and were about to start under a new management. *American Soda Fountain Co. v. Spring Water Carbonating Co.* 207 Mass. 488. And as to the alleged analyses shown by Page, of coke made from the federal coal at the by-product ovens in Everett, there was no evidence that these were false. On the evidence the plaintiff was entitled to have its third request given in substance.

3. The other exceptions are of lesser importance and may be

disposed of briefly. There was no error in refusing to give the plaintiff's eighth request, in view of the memorandum of analyses in Page's book, shown to Gano. The other requests have not been argued, but we find no error in the refusal to give them.

As to the exceptions to evidence: It is difficult to see how copies of the docket entries and declaration or "statement" in the Pennsylvania suit tended to show a lack of good faith in maintaining the present action. However, as the evidence in substance had already appeared without objection in the examination of the witness Page, the plaintiff does not appear to have been harmed. The unanswered letters of the defendants, dated December 13, 1909, and January 21, 1910 (exhibits 4 and 7), both written long after the date of the contract, were self-serving statements and inadmissible. *Maloney v. Philpot*, 219 Mass. 480.

The record shows that in the cross action a verdict was rendered by order of court for the plaintiff, James B. Coryell, trustee in bankruptcy of J. K. Dimmick and Company, and for some unexplained reason no exception appears to have been taken thereto. As there was error in the main action with reference both to the issue of breach of contract and that of false representations and the defendant's cross action was for breach of the same contract, and the two were tried together as one case, a new trial should be granted as to both.

Exceptions sustained.

MARY E. HANLON, administratrix, *vs.* FREDERICK LEYLAND AND COMPANY, LIMITED.

Suffolk. January 10, 1916. — March 10, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Negligence, Causing death. Actionable Tort. Comity. Jurisdiction. Executor and Administrator. Death.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of

the person whose death shall have been so caused." Following *Walsh v. Boston & Maine Railroad*, 201 Mass. 527.

Lord Campbell's act, St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence, is remedial and not penal.

Although St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence and requiring that such action shall be brought in the name of the executor or administrator of the person deceased but for the benefit of the wife, husband, parent and child of such person, vests no right of property in the deceased which survives to his personal representative, such an action under that foreign statute may be brought in this Commonwealth against a corporation having a usual place of business here by an administrator appointed here of the estate of a person whose death was caused in English waters by the negligence of the defendant.

CROSBY, J. This is an action brought by the administratrix of Joseph Dow, late of Boston, deceased, to recover damages for his death caused by the alleged negligence of the defendant by reason of which he was drowned in English waters.

The plaintiff, who has been duly appointed administratrix of the estate of the deceased in this Commonwealth, brings this action for the benefit of the wife and four minor children of the intestate. The action is founded upon St. 9 & 10 Vict. c. 93, enacted in 1846 and known as Lord Campbell's act. The act, so far as material, is as follows:

"That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the De-

fendant, shall be divided amongst the before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct."

The case comes before us on a report made by a judge of the Superior Court * who overruled a demurrer to the plaintiff's declaration. The report recited that "by agreement of the parties the following decisions of the English Courts may be referred to in the construction of Chapter 93 of the Statutes of the United Kingdom of Great Britain and Ireland 9th and 10th Victoria with the same force and effect as if pleaded in the declaration." The decisions referred to are then recited.

The inquiry is therefore presented, whether the plaintiff in her capacity as administratrix can maintain an action upon the statute in the courts of this Commonwealth. It is plain that our courts have jurisdiction of the parties. An action to recover damages for a tort is a personal action and is not local but transitory and can, as a general rule, be maintained wherever the wrongdoer can be found, and this is true whether the remedy sought to be enforced exists under the common law or is given by statute. The English statute obviously is not penal but remedial for the benefit of the persons injured by the death. *Higgins v. Central New England & Western Railroad*, 155 Mass. 176. *Walsh v. Boston & Maine Railroad*, 201 Mass. 527. The statute, like others similarly phrased, does not create a cause of action which accrued to the plaintiff's intestate in his lifetime and which survived and passed to his personal representative. The personal representative of the deceased is simply a nominal plaintiff. The damages recovered do not become part of the assets of the estate or liable for the debts of the deceased, but are distributed among the persons described in the statute. The statute expressly authorizes the action to be brought in the name of the personal representative who has been appointed as such by our court. In *Walsh v. Boston & Maine Railroad*, *supra*, this court said, at pages 529 and 530: "The fundamental question is whether there is a substantive right originating in one State and a corresponding liability which follows the person against whom it is sought to be enforced into another State. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced

* *Morton, J.*

ex comitate in another State, unless there is a good reason for refusing to enforce it."

No contention is made that the statute is objectionable because contrary to public policy or good morals or that its enforcement would be unjust or calculated to injure the State or its citizens, but it is contended by the defendant that, as the act does not provide for the survival in the personal representative or in the heirs or next of kin of any right of the decedent, the action cannot be maintained by the personal representative of the deceased in this Commonwealth. The defendant relies upon *Richardson v. New York Central Railroad*, 98 Mass. 85. It is true that that case held that an administratrix, appointed in Massachusetts, could not maintain an action in our courts to recover for the death of her intestate upon a New York statute which, like Lord Campbell's act, did not give any right of property which passed as assets of the deceased to the administratrix. It is also true, as the defendant argues, that the case of *Higgins v. Central New England & Western Railroad*, *supra*, dealt with a Connecticut statute under which the cause of action went to the administrator by survival. The same was true of the New York statute upon which action in *Walsh v. Boston & Maine Railroad*, *supra*, was brought. Lord Campbell's act fixes the liability where the death is due to negligence. It further declares who shall receive the damages when recovered and expressly designates the personal representative of the deceased as the person who may bring the action. It is difficult to see on what principle the plaintiff should be denied her right to maintain the action here and be compelled to secure her remedy in the English courts. We are of opinion that a plaintiff should not be precluded from maintaining an action upon a statute of a foreign country or of another of the United States to recover damages for the death of a person solely because no right of property under the statute is vested in the deceased which survives to his personal representative. Whatever the rights the plaintiff may have acquired under the English statute, she should be permitted by comity to enforce in our courts in accordance with the trend of modern decisions. *Higgins v. Central New England & Western Railroad*, 155 Mass. 176. *Sargent v. Sargent*, 168 Mass. 420. *Mulhall v. Fallon*, 176 Mass. 266, 268. *Walsh v. Boston & Maine Railroad*, 201 Mass. 527. *Dennick v. Central Railroad*, 103 U. S.

11. *Northern Pacific Railroad v. Babcock*, 154 U. S. 190. *Stewart v. Baltimore & Ohio Railroad*, 168 U. S. 445. *Barrow Steamship Co. v. Kane*, 170 U. S. 100. *Leonard v. Columbia Steam Navigation Co.* 84 N. Y. 48. Story, *Conflict of Laws*, (8th ed.) § 625, note (a).

In *Walsh v. Boston & Maine Railroad*, *supra*, it was said by Knowlton, C. J., speaking for this court, at page 533: "The case of *Richardson v. New York Central Railroad* has been materially modified if not overruled by the decision in *Higgins v. Central New England & Western Railroad*, *ubi supra*, in conformity with the more liberal practice that now prevails."

We are of opinion that the decision in *Richardson v. New York Central Railroad* cannot now be regarded as a binding authority so far as it holds that an action to recover damages for death cannot be maintained upon a statute similar to that under consideration for the reason that no property right survived to the personal representative of the deceased.

The judgment will be, order overruling the demurrer affirmed and the case remanded to the Superior Court for trial upon the merits.

So ordered.

C. L. Fawcinger, for the defendant.

W. R. Bigelow, for the plaintiff.

LELAND H. COLE, administrator, vs. BAY STATE STREET
RAILWAY COMPANY.

Essex. March 10, 1916. — March 15, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Damages, In tort. *Actionable Tort*. *Negligence*, Causing death.

All damages resulting to a person from personal injuries due to the negligence of another person should be recovered in one action. Two separate actions cannot be maintained by the same plaintiff, one for suffering and another for expenses incurred for medicine, nursing, care, and medical and surgical attendance caused by the same injury.

TORT by the administrator of the estate of Annie J. Chase for expenses incurred for medicine, nursing, care, medical and sur-

gical attendance rendered necessary by reason of injuries received by the plaintiff's intestate while a passenger upon a street railway car of the defendant. Writ dated November 11, 1914.

The action was tried, together with an action by the same plaintiff for the death and conscious suffering of the intestate, before *Irwin, J.* In the other action the jury found for the plaintiff in the sum of \$7,000 for the death and \$150 for conscious suffering. In the present action the evidence showed and the parties admitted that the plaintiff's intestate was injured by the negligence of the defendant and that charges of \$90 for services of a surgeon and \$22.95 for hospital expenses were proper and reasonable and were necessitated by the injuries caused by the defendant's negligence.

By agreement of the parties, the judge ordered a verdict for the plaintiff for the amount of his claims and reported the case to this court for determination, a verdict to be ordered for the defendant if the ordering of a verdict for the plaintiff was error; otherwise, the verdict for the plaintiff was to stand.

The case was submitted on briefs.

M. L. Sullivan & J. J. Ronan, for the defendant.

W. A. Pew, H. E. Jackson & O. E. Jackson, for the plaintiff.

BY THE COURT. The medical, hospital and other similar expenses incurred by the plaintiff's intestate were a part of the damages arising from her personal injury and could have been recovered in that action. *Turner v. Boston & Maine Railroad*, 158 Mass. 261, 266, 267. They cannot be made the subject of a separate action. *Sullivan v. Baxter*, 150 Mass. 261. *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447, 455.

Judgment for the defendant.

HARRY T. FOGG, administrator, vs. NEW YORK, NEW HAVEN,
AND HARTFORD RAILROAD COMPANY.

SAME vs. SAME.

Plymouth. January 17, 1916. — March 21, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Causing death, Railroad.

Where a driver of an automobile, the brakes and mechanism of which were in proper condition and which could have been stopped within sixteen feet, on a clear day approached a crossing at grade of a railroad with a travelled way at the rate of from six to twelve miles an hour along a highway where, throughout a course beginning one hundred and six feet from the crossing and running to a point seventy feet from it, there was an unobstructed view between two houses of a stretch of the tracks of the railroad to his left, beginning three hundred and twenty-two feet from the crossing and running to a point fourteen hundred and seventy-eight feet from it, and did not look up the track to his left until he was seventy feet from the crossing, when he made a motion toward his emergency brake but the forward movement of the automobile was retarded only slightly and it ran upon the railroad track and was struck by a railroad train, of which he had had no warning by whistle, bell or signal, and he was killed, an action against the railroad company for his death cannot be maintained under St. 1907, c. 392, § 1, because there is no evidence which would warrant a finding that the decedent was in the active exercise of care for his safety.

It also was *held* that the foregoing facts do not call for an application of the rule permitting a finding of due care on the part of one, who, suddenly and without fault on his part finding himself in a position of impending and unexpected danger, becomes confused, because the decedent's own carelessness placed him in such a position.

It appearing that the decedent's wife was with him in the automobile and also was killed and the only evidence as to her conduct being that, as the automobile approached the crossing, she was looking toward her right, it was *held*, that, if she was trusting to the care and caution of her husband, there could be no recovery for her death because he was negligent, and, if she was not so trusting, there could be no recovery because there was no evidence that she did anything for her own safety.

CARROLL, J. Ebenezer T. Fogg and Fannie M. Fogg, husband and wife, were struck and killed by a train of the defendant at a grade crossing near Kenberma station in the town of Hull on the afternoon of May 30, 1913. These actions are brought by their son, who is the administrator of both of their estates, to recover for their death.

At this point the railroad tracks run approximately north and south. The train was going in a northerly direction from Nantasket Beach toward Pemberton. Mr. and Mrs. Fogg, in an automobile driven by Mr. Fogg, approached the crossing from the east or ocean side, along Kenberma Street, into which they had turned from Manomet Avenue, a street running parallel with and about one hundred and twenty feet east of the tracks. On the south side of Kenberma Street and east of the tracks were two houses; the one nearer the tracks was seventy-one feet from the street line and twenty feet from the nearest rail; the other was twenty feet from the street line and fourteen feet from Manomet Avenue. Looking from Kenberma Street between these two houses, the tracks to the south could be seen throughout a course beginning at a point one hundred and six feet from the crossing and running to a point seventy feet from it. At a point one hundred and six feet from the crossing a man could be seen on the tracks at a distance of three hundred and twenty-two feet; at a point seventy feet from the crossing he could be seen fourteen hundred and seventy-eight feet to the south. After passing the point where the nearer house obstructed the view, at a point one hundred feet from the crossing, one hundred and nineteen feet of track were visible, and at fifty feet from the crossing one hundred and ninety-two feet of track could be seen. According to the record, the view of the traveller on Kenberma Street, looking south and approaching the crossing from the east, was in no way obstructed except by these two houses.

In 1901 Kenberma Street was laid out as a public way to the line on each side of the railroad location, no portion of which was included in the layout. On a post at the southeast corner of the crossing, facing east, was the sign, "Not a public crossing. Dangerous." This sign had become weatherbeaten, and the evidence was conflicting as to the distance at which it was legible. Another sign on the same post read, "No trespassing." There was evidence that this sign was not there at the time of the accident. No other signs were at the crossing, and there were no gates or flagman. Before the street was laid out the six-foot platform of the Kenberma station, extending on the east side of the tracks from what is now Kenberma Street north to Alden Street, was constructed by the defendant. North and south bound trains discharged their

passengers on the east side. Before the laying out of the street, there was a plank crossing between the tracks. This had been maintained and kept in repair by the defendant up to the time of the accident.

For eight summers Mr. Fogg had travelled on this Nantasket branch railroad. There was evidence that trains ran on an hourly schedule. It was generally understood that all trains stopped at this station. When the intestates were on Manomet Avenue, just before turning into Kenberma Street, a train passed them in full view, going in the direction of Pemberton. The train which hit the automobile was an express train going at the rate of thirty-five or forty miles an hour, and there was evidence that no signal of its approach by bell or whistle was given. The automobile was going at the rate of from six to twelve miles an hour, and, according to the evidence, could have been stopped inside of twice its length, or in about sixteen feet. One witness stated that Mr. Fogg looked toward Pemberton, and when about seventy-five feet from the crossing, he looked toward Nantasket. He then reached down for the brake, but the forward motion of the car was only slightly retarded, the car swinging to the right. Another witness stated that the deceased, when fifteen or twenty feet from the track, made some movement — "The car seemed to him to gradually slow up a little."

The actions are under St. 1907, c. 392, § 1. There was a verdict for the plaintiff in each case. *

Was there any evidence of due care of the intestates, sufficient for the consideration of the jury? Fogg, the driver of the car, was to some extent familiar with this crossing, and just as he turned from the avenue a train left Kenberma station for Pemberton. It was in the afternoon of a clear day, there was nothing to interfere with a view of the tracks to the south except the two houses, and between them for some distance there was an unobstructed view in this direction. The house nearer the crossing was seventy-one feet from the street line and twenty feet from the track, thus leaving a wide open space across which he could look, with nothing to interfere with his view, and a hundred feet from the

* The actions were tried together before *Keating, J.* The defendant alleged exceptions.

crossing he could see to the south along the track for a distance of one hundred and nineteen feet.

Coming to a place of danger like a railroad crossing, where there is opportunity for sight and hearing, a traveller is not in the exercise of due care unless he uses his senses, looks, listens and governs his conduct accordingly. He cannot entirely rely upon signals and the performance of duty by the agents of the defendant. He must actively seek to safeguard his own safety by using his faculties and making use of the means at hand to save himself from danger. At a railroad crossing the burden is upon the traveller to show due care (unless the action is under St. 1906, c. 463, Part II, § 245, for failure to give the required signals). Such a place is one of special danger. As has been said, the care which common prudence requires of a traveller on the highway where there is no such peril is not the standard by which his conduct must be judged when approaching the tracks of a railroad in front of a rapidly moving train; and further, there must be affirmative evidence of this care, or the circumstances must be such that it can be properly inferred. Passing by the space between the two houses, where a long stretch of track was plainly visible, knowing he was approaching a railroad crossing and one hundred feet therefrom, he could look far enough to see an approaching train and stop his car. He was then in a place of safety and had ample time to save himself from danger. If he did not look until he was seventy-five feet away, he might then have prevented the collision, for he could have stopped his car within a distance of twenty-five feet. Apparently he did nothing but make a motion in the direction of the emergency brake, the car slowing little, if any. This evidence fails to show the use of such care as the place and occasion demand. It shows a lack of that care which ordinary prudence requires.

The car was a new one. We must infer that the brakes and mechanism were in proper condition; there is no intimation to the contrary. The conclusion is irresistible either that Fogg did not look when he should, or looked in a careless manner, or else, seeing the approaching train and having the opportunity to prevent the collision, he failed to bring his car to a standstill, in which event he was careless. Again, if he failed to look until twenty feet from the crossing, considering the speed at which he

was going, with full opportunity, before reaching that point, to see the approaching train, he must be considered as failing in the use of due precaution. *Allen v. Boston & Maine Railroad*, 197 Mass. 298. *Lundergan v. New York Central & Hudson River Railroad*, 203 Mass. 460. *Slattery v. New York, New Haven, & Hartford Railroad*, 203 Mass. 453. *Ellis v. Boston & Maine Railroad*, 169 Mass. 600. *Farmer v. New York, New Haven, & Hartford Railroad*, 217 Mass. 158. *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137. *Rodrigues v. New York, New Haven, & Hartford Railroad*, 210 Mass. 305.

Nor can it be said that the driver of the car suddenly found himself in a place of peril, and, with the oncoming train within a short distance, became confused and failed to seasonably apply his brakes, and therefore was not careless. This rule cannot be invoked in behalf of a plaintiff who has placed himself in such a position through his own lack of care. *Rundgren v. Boston & Northern Street Railway*, 201 Mass. 156.

The case at bar is to be distinguished from *Hubbard v. Boston & Albany Railroad*, 162 Mass. 132, where the crossing was an "exceedingly dangerous" place, obstructions prevented one from seeing and a ledge interfered with hearing. In *Hicks v. New York, New Haven, & Hartford Railroad*, 164 Mass. 424, the crossing was looked upon as a dangerous one, where a house and other objects made it impossible to see an approaching train, and the plaintiff stopped, looked and listened, and neither saw nor heard the train. In *Hanks v. Boston & Albany Railroad*, 147 Mass. 495, and *Morrissey v. Boston & Maine Railroad*, 216 Mass. 5, the view of the traveller was obstructed.

If Mrs. Fogg trusted to the care and caution of her husband, her administrator cannot recover; if she did not do so, there is no evidence that she did anything for her own safety. There was evidence that as she approached the crossing she was looking toward the house on Alden Street, north of the crossing, in a different direction from the approaching train. *Shultz v. Old Colony Street Railway*, 193 Mass. 309. *Chadbourne v. Springfield Street Railway*, 199 Mass. 574. *Peabody v. Haverhill, Georgetown & Danvers Street Railway*, 200 Mass. 277. *Lundergan v. New York Central & Hudson River Railroad*, 203 Mass. 460.

As there was no evidence of due care on the part of the de-

cedents, the other questions in the case need not be considered. In both cases the exceptions are sustained.

Exceptions sustained.

F. W. Knowlton, (C. O. Pengra with him,) for the defendant.

Lee M. Friedman & T. H. Buttimer, (F. J. Geogan with them,) for the plaintiff.



HAROLD F. KELLEY vs. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. March 9, 1916. — March 24, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Of child, In use of highway, Street railway.

Where, at the trial of an action against a street railway company for personal injuries received when the plaintiff, a strong, bright boy between five and six years of age, on a summer evening in 1910 during daylight was run into by a street car of the defendant, the plaintiff's evidence shows that he had been playing beside the street with other boys at a watering trough in which there was a turtle, that suddenly he seized the turtle and, pursued or followed by his companions, ran diagonally across the street without looking for cars until he reached the defendant's tracks, that a bystander called out a warning to him of an approaching street car, that he then paused a moment and was struck by the car which came to a stop within fifteen feet, that the car was in plain sight and that there was no other traffic in the street, it is proper to order a verdict for the defendant at the close of the plaintiff's evidence.

BY THE COURT. The evidence showed that the plaintiff, a strong, bright boy between five and six years old, on a summer evening in August, 1910, during daylight, was, with other boys, on the side of a street at a watering trough, in which there was a turtle. Suddenly he seized the turtle, and followed or chased by other boys, ran diagonally across the street, without looking for cars, until he reached the tracks of the defendant laid in the street, when some bystander, seeing his danger from a near by rapidly approaching car, called out to him. He then paused an instant, and was struck and injured by the car, which came to a stop within fifteen feet or thereabouts.

The car was in plain sight and there was no other traffic in the

street. A verdict for the defendant was ordered rightly.* *Godfrey v. Boston Elevated Railway*, 215 Mass. 432, and cases there collected. *McManus v. Boston Elevated Railway*, 216 Mass. 191. *Mills v. Powers*, 216 Mass. 36. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467. *Donahue v. Massachusetts Northeastern Street Railway*, 222 Mass. 233.

Exceptions overruled.

J. P. Feeney, for the plaintiff, submitted a brief.

E. P. Saltonstall, (*R. S. Pattee* with him,) for the defendant.

JOHN B. RICHARDSON & another vs. RALPH W. BARTLETT.

Suffolk. March 24, 1916. — March 24, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Practice, Civil, Amendment, Parties, Nonsuit.

A judge presiding at a trial of an action of contract upon an account annexed for work, labor and materials has power during the trial to allow an amendment adding as a party plaintiff one who, according to the testimony of the original plaintiff on cross-examination, was a partner at the time of the incurring of the debt for the recovery of which the action is brought; and it is not necessary that the trial should be stopped or that the plaintiff should become nonsuit.

CONTRACT upon an account annexed for work and labor performed and materials furnished previous to November 5, 1912. Writ dated March 17, 1914.

The action was tried before *White, J.* The plaintiff John B. Richardson testified in cross-examination that at the dates of the items in the account annexed his brother Noah was his partner. Subject to an exception by the defendant the brother was added as a party plaintiff. The defendant also moved that the plaintiff be nonsuited, and the motion was denied. The defendant also saved a general exception to "all testimony going in under the amendment."

There was a verdict for the plaintiffs in the sum of \$107.14; and the defendant alleged exceptions.

* By *Bell, J.* The verdict was ordered at the close of the plaintiff's evidence.

C. S. Warshauer, for the defendant.

H. R. Scott, for the plaintiffs.

BY THE COURT. This record affords no foundation for the contention that the firm, with whom the defendant made the contract, was not composed of the persons named as plaintiffs in the writ and declaration as amended.

The court had authority to allow the amendment adding as one of the plaintiffs the person who, according to the testimony, was a partner at the time of the contract upon which the action was brought.

Exceptions overruled.

IDA H. SAMPSON vs. HENRY J. SAMPSON & another.

Hampden. September 28, 1915. — April 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Marriage and Divorce, Petition to vacate decree. *Husband and Wife*. *Evidence*, Private conversations between husband and wife, Of motive. *Domicil*. *Jurisdiction*. *Venue*. *Illegitimacy*. *Words*, "Lives," "Lived."

A petition to vacate a decree of divorce that was entered *nisi* and afterwards became absolute, which alleges that the petitioner was induced by the fraudulent conduct and representations of her husband not to contest the libel, to which she had a complete defence, being fraudulently induced by him to believe that the proceedings had been discontinued, and that she did not know of the granting of the decree until after it had been made absolute, states sufficient ground for relief, and an allegation that the petitioner did not receive notice of the libel for divorce is not necessary.

In such a petition, an allegation that the petitioner fraudulently was induced to believe that the "libel proceedings had been discontinued and dropped" is a sufficiently specific averment of a fraudulent representation. It is not necessary to set out in detail all the misrepresentations relied upon, and, if the respondent wishes for further particulars, he can file a motion for specifications.

Where a woman, who married the petitioner's husband after he had obtained the divorce sought to be annulled, had at her own request been made a respondent to the petition, it was *held* not to be necessary for the petitioner to add to her petition any averments in regard to the new respondent, as she merely had asked that the decree of divorce should be vacated and the libel should be dismissed, and did not seek any relief against the new respondent.

Where a petition to vacate a decree of divorce that was entered *nisi* and afterwards became absolute alleges that in the libel for divorce, which was filed in the county

of Hampden, it was alleged falsely that the residence of the libellant was in Springfield and that the residence of the libellee was in another State and that the libellee had deserted the libellant, whereas the residence of both of them was at Westport in the county of Bristol, and the petition also alleges that the petitioner was induced by fraudulent misrepresentations of the respondent not to contest the libel and to believe that the proceedings had been discontinued, the petition is not made defective by the omission of an allegation that the Superior Court of Hampden County had no jurisdiction over the libel for divorce, because the other allegations set forth a fraud upon the court combined with a fraudulent depriving of the petitioner of the opportunity to present her lawful defence to the libel, which together constitute a ground for relief.

It cannot be said as matter of law that a delay of seven or eight months after the entering of an absolute decree for divorce before filing a petition to vacate such decree is in itself necessarily laches.

At a hearing upon the petition to vacate a decree of divorce above described, the petitioner testified without objection that on the last Sunday in July in a certain year her husband visited her, remaining two nights and a day, that they had some talk "about the divorce case in Springfield, and that as a result of the talk, less than a week later, she went to Providence and got the letter containing the citation" on the libel for divorce, and, subject to the respondent's exception, she then was permitted to testify that, "as a consequence of that private conversation on the last Sunday in July, she didn't do anything about the divorce hearing after she got the letter containing the notice in Providence." *Held*, that the evidence was admissible to show a motive for the petitioner's conduct, which was material, and that it need not be excluded as being an indirect statement of the substance of a private conversation between husband and wife.

In the case above described the fundamental issue was whether the petitioner voluntarily refrained from contesting the libel for divorce or whether she was prevented from contesting it by the fraudulent practices of the respondent. The judge made the following finding: "From her opposition to his divorce petitions in Washington, from her conduct toward her husband while the divorce proceedings in Springfield were pending and from her conduct as soon as she learned that a divorce had been granted, the court finds that the respondent . . . , in some form of words in private conversation with his wife, fraudulently represented to her that he had abandoned the libel for divorce begun in Springfield; that, as a result of his conduct toward her and his representations to her, the petitioner did not believe that the libel for divorce was going to be prosecuted by the respondent . . . and did not appear to oppose it; that she did not know that it was to be tried; nor did she know that a decree *nisi* or a decree absolute was entered until about the third week in October, 1913," which was more than five months after the decree became absolute and about two months before she filed her petition to vacate the decree. *Held*, that the inferences drawn by the judge, which led him to the conclusion that the petitioner fraudulently was prevented from contesting the libel for divorce by what occurred between the husband and wife while alone, did not constitute a violation of R. L. c. 175, § 20.

The provision of R. L. c. 175, § 20, that "Neither husband nor wife shall testify as to private conversations with each other," does not exclude from legal consideration an inference as to what was said in such a private conversation based on the testimony of a wife that she had a private conversa-

tion with her husband in consequence of which she did a certain thing and did not do a certain other thing.

If, in a case where the domicil or legal residence of a man is material, it appears that his domicil by birth was in a certain county in this Commonwealth, that he married there and lived there with his wife, and that later when he had been absent he made frequent visits to his wife who continued to live in the house that they had lived in together, a finding is justified that he retained his domicil in that place.

In the provision of R. L. c. 152, § 6, that "Libels for divorce shall be filed, heard and determined in the Superior Court held for the county in which one of the parties lives," the word "lives" plainly means "has his or her legal residence or domicil."

In a finding of a trial judge that the libellant in a suit for divorce "lived there [in Springfield] during a part of the summer and fall of 1912" and a further finding that the domicil of the libellant at that time was in Westport, the word "lived" is used in the sense of subsisted and does not relate to legal residence.

Where a libel for divorce falsely alleged that the residence of the libellant was in the county of this Commonwealth where the libel was filed and that the residence of the libellee was in another State, whereas the residence of both of them was in another county of this Commonwealth, a ruling, made by the trial judge at the hearing of a petition to vacate the decree of divorce obtained in the suit so brought, in substance that the court had only an apparent and not a real jurisdiction of the libel, is correct.

Whether the Superior Court ever can have jurisdiction to try and decide a suit for divorce in which the venue of the libel was laid wrongly because neither of the parties lived in the county where the libel was filed as required by R. L. c. 152, § 6, here was mentioned as a question which it was not necessary to decide in the present case.

Where the libellant in a suit for divorce practised a gross fraud upon the court by a wilful misrepresentation that he had his domicil in the county where the libel was filed and that his wife was domiciled in a city in another State, whereas they both had their domicils in another county in this Commonwealth, and by falsely representing to his wife that he had abandoned the libel and hence that there was no occasion for her to take action, and thereafter without his wife's knowledge obtained a decree for divorce on a charge of desertion which he knew to be false and groundless, and where no service was made upon the wife such as is required upon a resident of this Commonwealth and she did not appear voluntarily, it was held that the court, by reason of the gross fraud by which it was attempted to make the court an instrument of oppression and to deprive the libellee of the opportunity to present her just defence to the libel, acquired no jurisdiction of the case, and it was ordered that the decrees *nisi* and absolute be vacated and that the libel be dismissed.

At the hearing of the petition to vacate a decree of divorce above described, it appeared that the divorce was obtained by the principal respondent in order that he might marry the other respondent, which he did within six months from the time that the divorce became absolute, and that thereafter a child was born of this marriage. The judge found that the petitioner first learned of the divorce from the principal respondent about two weeks before he married the other respondent, and that the petitioner at once consulted a lawyer. The petitioner testified that she knew that an application had been made for the license for

the marriage of the respondents about a week before the ceremony took place. The petition to vacate the decree was filed about a month and three weeks after that marriage and between seven and eight months after the decree of divorce became absolute. *Held*, that a finding was warranted that the delay in filing the petition to vacate the decree did not indicate either laches or want of good faith.

In the same case it was found in substance that the woman respondent at the time the marriage ceremony was performed supposed that she had a legal right to marry the principal respondent, and it was contended that, she having entered into the marriage relation in good faith and having become thereby the mother of a child, the divorce decree on which she had relied ought not to be disturbed. *Held*, that the marriage status of the petitioner must be upheld regardless of its effect on the woman respondent, who must suffer for the wrongdoing of the man that she thought she was marrying, her only protection being that afforded by St. 1902, c. 310, under which her innocence and the legitimacy of her child may be established.

PETITION, filed in the Superior Court for the county of Hampden on December 27, 1913, and subsequently amended, to vacate a decree of divorce, which was entered *nisi* in that court on October 22, 1912, and which became absolute on May 5, 1913, and to dismiss the libel.

As stated in the opinion, Alice G. Sampson upon her own application was made a respondent to the petition. Both respondents demurred to the petition as amended. The causes of demurrer assigned by the respondent Henry J. Sampson were as follows:

"1. That the petitioner has not stated such a case as entitled her to any relief against these respondents or either of them.

"2. That the petitioner has not alleged that she did not have due and proper notice of the pendency of the libel for divorce.

"3. That the petitioner has not set forth specifically and with sufficient detail the false and fraudulent misrepresentations alleged to be made to her by this respondent, and which the petitioner says induced her not to appear in the suit and contest it, and to believe that the libel proceedings had been discontinued and dropped.

"4. That the petitioner has not set forth specifically and with sufficient detail the method, means and manner in which she alleges this respondent concealed from her the granting of the decree *nisi* until it had become absolute.

"5. That the petitioner does not allege any good reason for not bringing this petition sooner than she has done, and within a reasonable time after the decree *nisi* had become absolute.

"6. That the place of filing the libel is a matter of venue and not of jurisdiction.

"7. That the petitioner has not sworn to her amended petition."

The causes of demurrer assigned by the respondent Alice G. Sampson were the same with two additional causes assigned as follows:

"8. That the petitioner does not allege any reason why relief should be granted against this respondent, who has married the other respondent in good faith.

"9. That the petitioner has not alleged any good reason why the petitioner did not bring proceedings before this respondent and the other respondent were married."

The demurrers were argued before *Raymond, J.*, who made orders overruling both demurrers, to which each of the respondents excepted. Later the case was heard by *Raymond, J.*, upon the issues raised by the answers of the respondents. He found the facts that are stated in the opinion and concluded the memorandum of his findings of fact as follows:

"The court finds,

"First: That the respondent Henry J. Sampson had no legal residence in Springfield; that his domicil and legal residence during all of the time while the divorce proceeding was pending were at Westport, where he now lives.

"Second: That the petitioner never deserted the respondent Henry J. Sampson.

"Third: That the petitioner has always been faithful to her marriage vows.

"Fourth: That the petitioner never resided in Providence.

"Fifth: That the respondent Henry J. Sampson by his conduct toward the petitioner and by the representations which he made to her fraudulently prevented her from appearing at court and contesting his libel at Springfield.

"Sixth: That the court had only apparent jurisdiction of the libels in Hampden County, founded on the respondent Henry J. Sampson's false allegation of domicil.

"Seventh: That the respondent Henry J. Sampson obtained his divorce by false testimony.

"Eighth: That the petitioner did not unreasonably delay filing the petition to vacate the decree for divorce."

The judge ordered that the decree absolute and the decree *nisi* be vacated and annulled and that the libel be dismissed. The respondents alleged exceptions.

The first part of R. L. c. 175, § 20, is as follows:

"Section 20. Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court, or before a person who has authority to receive evidence, except as follows:

"First, Neither husband nor wife shall testify as to private conversations with each other."

The case was argued at the bar in September, 1915, before *Rugg, C. J., Loring, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

C. R. Cummings, for the respondents.

I. Brayton, for the petitioner.

RUGG, C. J. This is a petition by *Ida H. Sampson* to set aside a decree *nisi* and a decree absolute entered in a libel for divorce brought against her by her husband, *Henry J. Sampson*. Thereafter, *Alice G. Sampson* was allowed to intervene as a party respondent. Their several demurrers present the first point to be decided. The petitioner avers in substance that she was lawfully married to *Henry J. Sampson* in 1903, and that thereafter until April, 1913, they cohabited together as husband and wife in Westport in the county of Bristol in this Commonwealth; that in July, 1912, her husband entered in the Superior Court for the county of Hampden a libel for divorce, wherein it was alleged that his residence was in Springfield in this Commonwealth, and that her residence was in Providence in the State of Rhode Island; that she had deserted him in January, 1908; and that in October, 1912, a decree *nisi* was granted, which was made absolute in May, 1913; that all these allegations in the libel were false, as the libellant well knew, and that in truth the residence of both herself and her husband was in Westport, where at those times they were living in cohabitation as husband and wife; and that by fraudulent misrepresentations she was induced not to contest said libel and to believe that the proceeding had been discontinued, and that she did not know of the granting of the decree until after it had been made absolute.

1. An allegation that the petitioner did not receive notice of

the libel was not necessary. The averment of fraudulent inducement by the husband not to contest the libel was enough. An inducement by fraud to abstain from defending oneself may be as harmful in its consequences as to accomplish the same end by fraudulent prevention or by violence. The essence of the ground for relief is a result accomplished by fraud.

2. The fraudulent representation, although not set out in the petition with technical precision, is in substance that the "libel proceedings had been discontinued and dropped." This is an allegation of specific fraudulent representations and is something more than a general unsupported averment of fraud, which standing alone would not be enough. *Nichols v. Rogers*, 139 Mass. 146. *Butler v. Directors of the Port of Boston*, 222 Mass. 5. It was not necessary to set out in detail all those misrepresentations. The continued cohabitation during the pendency of the libel may be treated as an act of misrepresentation to that end. If further particulars were deemed necessary for their defence by the respondents, a motion for specifications was their appropriate form of relief. *Ford v. Ford*, 104 Mass. 198.

3. It was proper at her own request to admit as a party to defend Alice G. Sampson, who had joined in a marriage ceremony with Henry J. Sampson subsequent to the entry of the decree absolute in the libel for divorce and thereafter had cohabited with him as his wife. The present petitioner seeks no relief against her in this proceeding. Therefore, it was not necessary to insert any averments respecting her in the amended petition after she was admitted as a respondent.

4. Failure to allege in the petition that the Superior Court of Hampden County had no jurisdiction over the libel for divorce was not so essential as to be ground for demurrer. So far as that was relied on, it was an inference of law from the facts pleaded. Indeed, that as a bald proposition is not the single ground for relief. Facts sufficient to show a fraud upon the court are set out in the petition, and that, coupled with the invasion of the petitioner's rights by fraud, is the foundation of the petition.

5. Although advantage may be taken of the defence of laches by demurrer when it appears on the face of the pleadings, *Sawyer v. Cook*, 188 Mass. 163, 168, a delay of between seven and eight months after the granting of the decree absolute cannot be pro-

nounced unwarranted as matter of law. *Rolikatis v. Lovett*, 213 Mass. 545, 548. *Albiani v. Evening Traveler Co.* 220 Mass. 20, 26. *Holbrook v. Brown*, 214 Mass. 542.

6. At the hearing on the issues raised by the answers, the petitioner testified without objection that on the last Sunday in July, 1912, her husband visited her, remaining two nights and a day, and that they had some talk "about the divorce case in Springfield, and that as a result of the talk, less than a week later, she went to Providence and got the letter containing the citation" on the divorce libel. She was permitted to testify subject to exception that "as a consequence of that private conversation on the last Sunday in July, she didn't do anything about the divorce hearing after she got the letter containing the notice in Providence."

It is a principle of the common law which is embodied in R. L. c. 175, § 20, cl. 1, that "Neither husband nor wife shall testify as to private conversations with each other." That principle always has been declared and enforced by this court. *Dexter v. Booth*, 2 Allen, 559. *Commonwealth v. Cleary*, 152 Mass. 491. *Fuller v. Fuller*, 177 Mass. 184. *Baldwin v. Parker*, 99 Mass. 79, 83. *Leland v. Converse*, 181 Mass. 487. See Wigmore on Evidence, §§ 2334-2340. But it never has been extended so far as to prevent the introduction of evidence to prove that there had been a private conversation. That fact, when competent, may be shown although the conversation itself may not be admissible by the testimony of either husband or wife. Proof of that fact is quite disconnected from any direct or indirect statement of the substance of the conversations.

The petitioner, after receiving by registered mail at Providence notice that her husband had brought a libel for divorce in Hampden County, returnable in August, took no steps respecting it for more than a year. The motives which led her to this course of conduct were important as bearing upon the question whether she was barred by laches from maintaining the present petition. The operations of her mind and the reasons for her conduct were material. She was a competent witness upon this point. *Knight v. Peacock*, 116 Mass. 362. *Toole v. Crafts*, 193 Mass. 110. *Carriere v. Merrick Lumber Co.* 203 Mass. 322, 327. That one of the factors going to make up her motive for conduct was the fact of a

private conversation was not an indirect method of proving the substance of that conversation. There is a plain line of demarcation between the occurrence of the fact of a private conversation between husband and wife, which may be competent, and a narration of the substance of that conversation by either of them, which is not competent. That line, in the opinion of a majority of the court, was not overstepped in the case at bar.

7. Exception was taken to this finding of the trial judge: "From her opposition to his divorce petitions in Washington, from her conduct toward her husband while the divorce proceedings in Springfield were pending, and from her conduct as soon as she learned that a divorce had been granted, the court finds that the respondent, Henry J. Sampson, in some form of words in private conversation with his wife, fraudulently represented to her that he had abandoned the libel for divorce begun in Springfield; that, as a result of his conduct toward her and of his representations to her, the petitioner did not believe that the libel for divorce was going to be prosecuted by the respondent, Henry J. Sampson, and did not appear to oppose it; that she did not know that it was to be tried; nor did she know that a decree *nisi* or a decree absolute was entered until about the third week in October, 1913."

It plausibly is urged in support of this exception that in effect this is a finding by inference as to what were the private conversations between husband and wife, and that, as direct evidence as to such conversations is incompetent, *Leland v. Converse*, 181 Mass. 487, the judge had no right under the law to find by inference what they were and base a conclusion thereon.

That statute simply provides that neither the husband nor the wife shall testify as to their private conversations. It does not exclude from the realm of evidence proof of acts designedly induced by those conversations and legitimate inferences as to the cause of such acts.

The fundamental issue was whether the petitioner voluntarily refrained from contesting the libel, or whether she was prevented by the fraudulent practices of the respondent from contesting the libel. That was the issue which the judge had to decide. The substance of his finding is that the respondent fraudulently prevented the petitioner from contesting the libel for divorce. The rest of the finding is subsidiary and ancillary to that main fact.

Numerous incidents point to the exercise of some coercive power to overcome the free desire of the wife. There was evidence admitted without objection that the pending proceeding for divorce was the subject of conversation between the husband and wife. The judge might have found that the respondent sought the petitioner with the express design of urging deceitful representations. The statute does not prevent a court from exercising its sound judgment as to the influences which may have been exerted under the shelter afforded by such privacy, and from inferring that thus fraud had been practiced which prevented the petitioner from contesting the libel, and that thereby the result was produced now sought to be set aside. To draw the inference, which seems almost irresistible from all the circumstances, that the petitioner was fraudulently prevented by what occurred between the husband and wife while alone, is no violation of the statute in the opinion of a majority of the court.

8. It has been found as a fact that Henry J. Sampson had no legal residence in Springfield, was there during a part of the summer and autumn of 1912 "for the sole purpose of obtaining a divorce from his wife, well knowing that he had no legal ground for a divorce," and that "his domicil and legal residence during all of the time while the divorce proceeding was pending was at Westport, where he now lives." Confessedly the domicil and residence of the petitioner during the entire crucial period were at Westport. As to these matters, the libel falsely alleged the residence of Henry J. Sampson to be in Springfield in the county of Hampden, and that of Ida H. Sampson to be in Providence in the State of Rhode Island. The judge further found that the court had only apparent jurisdiction of the libel in Hampden County "founded on the respondent Henry J. Sampson's false allegation of domicil." So far as these are findings of fact they are abundantly warranted by the evidence. His findings of fact are not open to review. The only question is whether as matter of law there was any evidence to support them, and whether these findings were pertinent to the decision of the case. *Bailey v. Marden*, 193 Mass. 277. *Wade v. Smith*, 213 Mass. 34.

9. The domicil of the husband might have been found to have been in Westport. That was his domicil of origin. It will not be treated as lightly lost in the absence of some clear purpose

coupled with the necessary physical facts sufficient to constitute a change. His constant visits to his wife who remained in the home jointly established and occupied by them for most of the married life, coupled with his otherwise itinerant mode of life, was ample evidence to justify the finding.

10. Plainly the word "lives" in R. L. c. 152, § 6, which provides that "Libels for divorce shall be filed, heard and determined in the Superior Court held for the county in which one of the parties lives," connotes a legal residence or domicil. *Hanson v. Hanson*, 111 Mass. 158. *Winans v. Winans*, 205 Mass. 388. *Labonte v. Labonte*, 210 Mass. 319.

11. There is no inconsistency in the finding that Henry J. Sampson "lived there [in Springfield] during a part of the summer and fall of 1912," and the further finding that his domicil was in Westport. Manifestly "lived" in the finding just quoted was used in the sense of subsisted and not as synonymous with legal residence, as contended by the respondents.

12. The ruling of law to the effect in substance that the court had only an apparent and not a real jurisdiction of the libel was right. There is ground for the argument that the Superior Court, even though a court of general jurisdiction, did not have jurisdiction, using that word in its accurate sense, of the libel for divorce. This argument may be grounded upon the words of R. L. c. 152, § 8, which are the same in Rev. Sts. c. 76, § 15; Gen. Sts. c. 107, § 19; Pub. Sts. c. 146, § 9, requiring the "libellee to be summoned to appear and answer at the court having jurisdiction of the cause," a single court of general jurisdiction having jurisdiction of the general subject of divorce all the while, *Banister v. Banister*, 150 Mass. 280, as well as upon the words of R. L. c. 152, § 6, to the effect that "Libels for divorce shall be filed, heard and determined in the Superior Court held for the county in which one of the parties lives." *Moore v. Moore*, 2 Mass. 117. *Richardson v. Richardson*, 2 Mass. 153. But it is not necessary to decide that point now, nor to determine that in no instance can the Superior Court of a county, in which a venue of the libel has been laid wrongly, have jurisdiction to decide the issues raised.

In the case at bar the gross fraud practised by Henry J. Sampson upon the court in view of all the facts was such that the Superior Court for Hampden County acquired no jurisdiction of the cause

or of the present petitioner. That fraud consisted in a wilful misrepresentation that he had a domicile in Hampden County, that his wife was domiciled in Providence in the State of Rhode Island, in an abuse of her confidence in misleading her by base methods into the mistaken belief that, after he had caused a publication of the notice of the pendency of the divorce proceedings to be called to her attention, he had abandoned the libel and hence there was no occasion for her to take action, and the contemporaneous prosecution to a final decree in his favor by perjured evidence of a libel for divorce bearing on its face an averment of one of the statutory causes which, as he well knew, was false and groundless, no service having been made upon the libellee such as the law requires as the prerequisite for jurisdiction over her person (in the absence of voluntary appearance) in all cases where she is a resident within the Commonwealth. The perjured evidence alone would not be enough to set aside a decree entered by a court which had jurisdiction of the cause and which had acquired jurisdiction of the parties. But this record on the facts found discloses a case where by craft and deceit extrinsic and foreign to the issues raised on the face of the libel the court was induced to assume a jurisdiction which it could not have exercised if the truth had been known, and where the adversary party was prevented by a flagitious betrayal of conjugal confidence from making appearance in court or in any way contesting the procedure, even though it was called to her attention by him by an irregular service. This presents a case of legal fraud quite outside and beyond the intentional introduction of false testimony. It discloses substantial grounds for relief not only to prevent a wrong to the present petitioner but to frustrate an attempt to make the court an instrument of oppression in aid of a surreptitious sham founded on wrongful artifice. In such case relief will be afforded. *Edson v. Edson*, 108 Mass. 590. *Tucker v. Fisk*, 154 Mass. 574, 578. *Wiley v. Wiley*, 161 Mass. 446. *Keyes v. Brackett*, 187 Mass. 306. *Zeitlin v. Zeitlin*, 202 Mass. 205, 207.

13. The husband's conduct in maintaining marital relations with the petitioner on his monthly visits over Sunday during the pendency of the libel, the last occasion being almost six months after the decree of divorce had been made absolute, was a fact rightly given weight in determining whether he had represented

to his wife that the libel had been abandoned. These visits apparently were received with the confidence appropriate to the wifely relation. When they are considered in connection with the baffling by the wife of two earlier attempts on the husband's part to obtain a divorce in the State of Washington, they might have been regarded as showing that she had confidence in the rectitude of his intentions. There is nothing to indicate that she ever had renounced her opposition to his obtaining a divorce. If she was believed by the judge from her appearance and testimony to be a virtuous woman, it is almost inconceivable that she would have continued to receive him as husband if she had any suspicion that he still was attempting to sever the marriage tie. The inference from his conduct was warranted that the wife took no steps to contest the divorce because he so abused her confidence and played upon her credulity in his sincerity as to make her certain that the divorce proceeding had been abandoned. His conduct alone, apart from any verbal statement, might have been treated as a representation to that effect.

14. The respondents contend that the petitioner is shown on the evidence to have failed to exercise diligence and good faith in instituting this proceeding. The judge found that she first learned of the divorce about the third week in October, 1913, from Henry J. Sampson, after he had cohabited with her two nights, and that she at once consulted a lawyer who did not act for her, and within a day or two after November 5, 1913, she consulted her present attorney and this petition was filed on December 27, 1913. In the meantime, on November 5, 1913, a marriage ceremony had been performed between Henry J. Sampson and Alice G. Wordell. The marital relation has existed between them since and a child has been born. The petitioner testified that she knew that application had been made for the license for this marriage about a week before the ceremony took place. It should be added in this connection that the judge found that the purpose of Henry J. Sampson in attempting to obtain a divorce from the petitioner in the State of Washington and later in Springfield was that he might marry Alice G. Wordell, who lived near the petitioner in the same town; that the two respondents had maintained friendly relations during 1910, 1911 and 1912, had corresponded with each other, and that he frequently saw her when he returned to Westport.

In May, 1911, the petitioner had a talk with the respondent Alice and charged her with breaking up the petitioner's home, and that respondent said she was sorry and promised not to have anything more to do with Henry J. Sampson.

These circumstances fail to show laches or lack of good faith. It is apparent from the record that the judge in substance gave credence to the testimony of the petitioner and utterly distrusted that of the respondent. He found in effect that she had been the victim of a high degree of perfidy on the part of her husband as to matters most precious to a wife. She appears to have acted at once upon hearing that the marriage license had been applied for, and at all events before the ceremony was performed between the respondents. The time for opposing the granting of a divorce had gone by so far as concerned the court records, for in that regard she was told truly that the decree had been made absolute. The facts were extraordinary. The delay in filing the petition to vacate the decree cannot be pronounced, as indicative either of laches or want of good faith.

15. It was found in substance that Alice G. Wordell honestly supposed that she had a legal right to marry Henry J. Sampson at the time when the marriage ceremony was performed, although it does not appear that she made an investigation to ascertain what the grounds of the libel were. It is urged that, because she has entered into that marriage relation in good faith and thereby has become the mother of a child, no relief ought to be granted which will have the effect of annulling that marriage. Reference is made to the analogies of title acquired by an innocent purchaser for value and by the buyer of goods sold in market overt. These suggestions are without weight under the circumstances here disclosed. The marriage between the petitioner and her husband was valid. It established a status recognized as of the highest importance to the moral and social welfare of the State. It cannot be dissolved during their joint life except for the limited causes and in the narrow manner allowed by the statute. A legal wife at least is as much entitled to have her status preserved as is an unfortunate and possibly duped woman, who mistakenly thought herself to be the second wife, to have her status justified and established. *Turner v. Williams*, 202 Mass. 500. The supposed second wife hardly can ask to be protected by such a trick

upon the courts as that by which Henry J. Sampson obtained the appearance of a legal divorce. The position of the second wife is unfortunate. But she is in no worse condition than any woman who marries a man already married. The guilt of the husband is the sole cause of her misfortune, to which no act of the petitioner contributed. The court cannot suffer itself to be used fraudulently by a man, reckless of his initial marriage obligations, as an instrumentality for wronging his first wife, merely to protect his second wife. *Holmes v. Holmes*, 63 Maine, 420. Moreover, some measure of protection is afforded by St. 1902, c. 310, whereby her innocence and the legitimacy of her child may be established.

All the exceptions which have been argued have been disposed of by what has been said. The others are treated as waived. But an examination of them discloses no reversible error.

Decree affirmed.

HYMAN SECOULSKY vs. OCEANIC STEAM NAVIGATION COMPANY.

Suffolk. November 16, 1915. — April 5, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, What constitutes, In writing. *Carrier*, Of passengers: limitation of liability for baggage.

Where one having a certificate for a third class passage in a steamship exchanged it for a third class ticket and sailed on the steamship, he thereby accepted a stipulation printed in English on the ticket limiting the liability of the steamship company for loss of baggage to \$50, although he did not understand the English language and before receiving his ticket he asked the person in charge of the ticket office to have his baggage insured and offered to pay for such insurance and was told by the man in the ticket office that this was not necessary.

BRALEY, J. The jury having found that through the defendant's negligence the plaintiff's baggage was lost, the only question is whether the ruling as to the measure of damages was correct.

The prepaid certificate for a third class passage, purchased of the defendant in this Commonwealth by the plaintiff's son, was transmitted to his father; but whether in making the purchase the son acted as the plaintiff's agent, or whether the certificate

was a gift, does not appear. The plaintiff, having exchanged the certificate for a third class ticket at Liverpool, sailed on the steamship; but his baggage was not put on board or was lost during the voyage.

The contract was made in Liverpool. *O'Regan v. Cunard Steamship Co.* 160 Mass. 356. And, no evidence of the common law of England having been introduced, we assume that it is the same as our own. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 107. By its terms as printed on the ticket the defendant's liability for the loss of baggage was limited to ten pounds or, as agreed by the parties, the sum of \$50, and ordinarily the limitation would be controlling. *Garvan v. New York Central & Hudson River Railroad*, 210 Mass. 275, 278, and cases cited.

But from the plaintiff's testimony a finding would have been warranted that upon presentation of the certificate and before receiving the ticket the plaintiff, through an interpreter, asked the person in charge of the defendant's ticket office to have his baggage insured, offering to pay therefor rather than to take any chance of loss. "I told him that I had valuable things, valuable articles, and I wanted it insured, and he said it was not necessary." "It is not necessary . . . and it will come."

While the exceptions state that he was unable "to read and write" the English language, this fact of itself would not avoid the contract. The plaintiff knew he could not embark or be cared for during the journey unless he obtained a ticket and that the paper received in exchange for the certificate was a ticket; and it is of no consequence that before embarking he failed to acquaint himself with the contents. *Fonseca v. Cunard Steamship Co.* 153 Mass. 553, 555. *O'Regan v. Cunard Steamship Co.* 160 Mass. 356, 359, 361.

The plaintiff relies on *McKinney v. Boston & Maine Railroad*, 217 Mass. 274, as stating a different rule. But, while in that case the shipper's agent, who transacted the business, was illiterate, the bill of lading never reached the shipper; and there was no evidence, as there is in the case at bar, that the contract relied on by the carrier had been mutually accepted and acted upon as forming the only contract between the parties. *Boynnton v. American Express Co.* 221 Mass. 237. The limitation therefore was binding on the plaintiff.

And the instructions* being correct, the exceptions must be overruled.

So ordered.

The case was submitted on briefs.

S. L. Bailen & F. Leveroni, for the plaintiff.

E. E. Blodgett, S. R. Jones & A. C. Burnham, for the defendant.

GEORGE M. BROOKS & another vs. WILLIAM E. NEAL receiver.

Suffolk. November 19, 1915. — April 5, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Release. Joint Debtors. Receiver.

A judgment on one entire debt against two joint defendants is discharged as to both defendants by a release under seal discharging one of them.

A receiver has authority with the approval of the court that appointed him to compromise a judgment debt of two joint debtors, where he has been unable to find any property of either of them, by releasing the debtors on receiving a sum of money less than the amount of the judgment from one of them.

AUDITA QUERELA under R. L. c. 192, §§ 1, 2, by George M. Brooks of Arlington and Frank P. Brooks of Plymouth against William E. Neal of Lynn, as receiver of the property of the American National Bank of Boston, to restrain him from instituting or prosecuting any further proceedings upon a judgment against the plaintiffs for \$6,425.01 damages and \$30.40 costs alleged to have been discharged by a release under seal. Writ dated February 19, 1913.

The release, of which a copy was attached to the writ and declaration, was as follows:

"Know all men by these presents that I, William E. Neal, of Lynn, in the County of Essex, the Receiver of the American

* Given by *Hitchcock, J.*, who, after the jury had returned answers to certain special questions, ordered them to return a verdict for the plaintiff in the sum of \$50 with interest thereon from the date of the writ. The plaintiff alleged exceptions.

National Bank of Boston, in the District of Massachusetts, duly appointed by the Comptroller of the Currency of the United States of America and qualified as such receiver, acting under and in pursuance of the authority of the decree of the District Court of the United States entered on April 18, 1911, on my petition as such receiver for leave to compromise a certain claim of the said American National Bank against George M. Brooks, of Arlington in the County of Middlesex, in consideration of the sum of three hundred twenty-five (325) dollars to me paid by said George M. Brooks, the receipt whereof is hereby acknowledged, hereby on behalf of the said American National Bank and of myself as receiver thereof release and forever discharge said George M. Brooks from all liability upon a certain promissory note for the sum of five thousand one hundred thirty-five and ninety hundredths (5135.90) dollars, made by the said George M. Brooks and one Frank P. Brooks, and against judgment thereon amounting to six thousand four hundred fifty-five and forty-one hundredths (6455.41) dollars, duly recovered in the Superior Court in the County of Suffolk and Commonwealth of Massachusetts under date of September 7, 1909, upon which execution was issued September 29, 1909.

"In witness whereof I have hereunto set my hand and seal this twenty-sixth day of April, 1911. William E. Neal, Receiver. [Seal]"

In the Superior Court the case was tried before *King, J.* The facts appeared which are stated in the opinion. It was admitted that the receiver received the sum of \$325 named in the release in compromise of his claim against George M. Brooks. Subsequently on a *pluries* execution on the same judgment Frank P. Brooks was summoned for examination in poor debtor proceedings under R. L. c. 168, and this writ of *audita querela* was brought.

The defendant asked the judge to make the following rulings:

- "1. Upon all the evidence the plaintiff cannot recover.
- "2. Upon all the evidence the plaintiff Frank P. Brooks is not entitled to any relief.
- "3. Upon all the evidence the plaintiff Frank P. Brooks is not entitled to recover.
- "4. Upon the law and the evidence, the defendant is entitled to have the court declare and adjudge that said judgment referred

to in the plaintiff's complaint is still valid and subsisting and undischarged so far as it affects or relates to said Frank P. Brooks.

"5. The alleged release given by William E. Neal, receiver, is not a valid release.

"6. The alleged release purporting to be signed by the defendant in this action was beyond his powers or authority to give.

"7. The alleged release set up by the plaintiffs in this action purporting to be signed by the defendant was not effectual to discharge and release the defendant Frank P. Brooks.

"8. The defendant, being receiver, had only such powers as were conferred upon him by the order and decree of the court, which was, namely, only to compromise the claim so far as it referred to the plaintiff George M. Brooks and had no effect to discharge or release or compromise the claim or judgment as against the defendant Frank P. Brooks.

"9. The defendant, acting as receiver, had no right or authority to release the judgment complained about by payment of a portion thereof.

"10. Any purported release of the judgment for money in consideration of a less sum, is invalid, and the release set up by the plaintiff is invalid to discharge the plaintiffs, and especially the plaintiff Frank P. Brooks."

The judge refused to make any of these rulings, and made the following orders:

"1. The plaintiffs are entitled to judgment for relief adapted to the case and to the prayer of the writ.

"2. The judgment obtained in this court on September 7, 1909, in favor of the defendant in this action and against the plaintiffs herein for \$6,455.41 was discharged by an instrument in writing under seal, executed by the defendant on April 26, 1911, purporting to release and discharge George M. Brooks, the plaintiff herein, and joint judgment debtor in said judgment with Frank P. Brooks.

"Said instrument contained no reservation of rights against Frank P. Brooks and amounted to a technical release of both judgment debtors, the plaintiffs herein.

"3. The defendant and all persons claiming under him are to be permanently enjoined from hereafter causing to be issued against the plaintiffs, or either of them, any further or other executions for the collection of said judgment or any part thereof

and from instituting or prosecuting any further proceedings against the plaintiffs or either of them in this or any other court of this Commonwealth, for the enforcement or collection of said judgment or any part thereof.

"4. The plaintiffs are to have judgment for their costs against the defendant in this action."

The defendant alleged exceptions.

C. F. Eldredge, for the defendant.

P. A. Hendrick, for the plaintiffs.

DE COURCY, J. The judgment against George M. Brooks and Frank P. Brooks created a liability which was entire and indivisible, and which necessarily would be destroyed by the discharge of one of the debtors. *Contakis v. Flavio*, 221 Mass. 259. Neal, the receiver, compromised with George M. Brooks, one of the joint debtors, and gave him a release under seal, purporting to discharge the said George M. Brooks from all liability on the note and judgment. This amounted to a technical release of the joint debtor, Frank P. Brooks, and the instrument discloses no intention to reserve any rights against him. *Hale v. Spaulding*, 145 Mass. 482. *National Security Bank v. Hunnewell*, 124 Mass. 260. See *Matheson v. O'Kane*, 211 Mass. 91.

Some time after the giving of this release, the receiver was authorized to sell certain assets, including the judgment in controversy; and in consideration of \$300 he sold and assigned to Rufus Coffin certain promissory notes, a "judgment against Frank P. Brooks \$6,130.40," and divers pending suits. The subsequent proceedings under the judgment were brought by Coffin in the name of the receiver. His contention is that the receiver had no right to give the release which he executed, and that it is void so far as it affects Frank P. Brooks.

Assuming that the validity of the release can be attacked collaterally in these proceedings, the record does not particularly disclose the nature of the receivership, nor the powers originally conferred upon the receiver by statute or by decree. See *Magee on Banks & Banking*, (2d ed.) 776. Plainly he had authority to compromise the doubtful debt with the approval of the court. *In re Croton Ins. Co.* 3 Barb. Ch. 642. *Jackson v. Horton*, 126 Ill. 566. *Alexander v. Maryland Trust Co.* 106 Md. 170. *State v. Bank of Rushville*, 57 Neb. 608. *High on Receivers*, (4th ed.) §§ 177, 336.

See U. S. Rev. Sts. § 5234. The special petition brought by him in the Federal Court set forth the offer of \$325 "in full settlement of all claims of your receiver against said George M. Brooks," his reasons for recommending it (including the fact that he had been unable to find any property of either of the joint debtors), and the approval of the comptroller of the currency. A decree was entered by the court authorizing the receiver to compromise the claim as prayed for. The only claim he had against George M. Brooks was that on the joint judgment. As he never sought to have the release reformed or cancelled, we must assume that, in executing it, he intended the legal consequences of his act, one of which was that no foundation was left for an action against Frank P. Brooks.

The rulings requested were refused rightly and the plaintiff Frank P. Brooks is entitled to the relief sought. *Brckett v. Winslow*, 17 Mass. 153.

Exceptions overruled.

HARRY FREEDMAN vs. BESSIE LIPMAN & others.

Suffolk. March 6, 1916. — April 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Practice, Civil, Exceptions. Supreme Judicial Court.

Where upon a bill of exceptions it appears that certain evidence, to the admission of which an exception was taken, might conceivably have been competent in some aspects of the trial and the record is so meagre that it cannot be said that the admission of the evidence adversely affected the substantial rights of the excepting party, the exception will be overruled.

Where a bill of exceptions fails to indicate that there was any evidence to which certain rulings refused by a presiding judge were applicable, the exceptions to the refusal to make the rulings will be overruled without considering whether they are sound in law or not.

Upon a petition to establish exceptions, which comes before this court upon the report of a commissioner, it is not appropriate to make a motion under St. 1913, c. 716, § 3, for an amendment of the record in this court, because the only exceptions that can be established and considered are those that the trial judge refused to allow.

Where upon a petition to establish exceptions it had been asked improperly that a copy of the charge of the trial judge might be annexed to the record, it was *said*, that an examination of the copy of the charge presented for annexation disclosed no error, for the reason that the evidence was not set forth with sufficient fullness to show that the charge was not apt and complete.

RUGG, C. J. This is an action of contract upon a promissory note. At the trial, the plaintiff contended that the consideration for the note was money, but the defendants contended that it was part of an agreement between the plaintiff, who was the tenant, and the defendants, who were his lessors, whereby the tenant promised to improve the demised premises by an expenditure of not less than \$2,800, and the defendants promised to give to the plaintiff the note. The defendants offered in evidence an unsigned draft of an agreement setting out the terms of the bargain substantially in accordance with their contention, together with testimony that this draft was delivered to the plaintiff and was retained by him several days. An attorney testified that he made the draft agreement at the request of one of the defendants, "and after a talk with the plaintiff." The paper was admitted against the plaintiff's exception. It is conceivable that, in some aspects of the trial, the fact that such an agreement, drawn under the circumstances here disclosed, and put for a time in the plaintiff's possession, might be competent. *Nichols v. Commercial Travellers' Eastern Accident Association*, 221 Mass. 540, 547. It is for the excepting party to show that he has been prejudiced by the admission of the evidence. That does not appear from this meagre bill of exceptions. This record does not make it manifest that the admission of this evidence has adversely affected the substantial rights of the plaintiff. *Worrell v. Baldwin Chain & Manuf. Co.* 222 Mass. 355. St. 1913, c. 716, § 1.

The plaintiff asked the judge * to give two rulings.† There is nothing in the bill of exceptions to indicate that there was any

* Fox, J.

† "1. In the absence of any evidence of fraud practised upon the endorsers A. Lipman and Ginsberg the plaintiff is entitled to recover as against them.

2. "If the jury believe that some fraud may have been practised upon the defendant Mrs. Lipman, and if they find that no fraud was practised upon her husband, Mr. Lipman, and the indorser Ginsberg, the plaintiff may recover against them."

evidence to which these requests were applicable. It is not necessary to determine whether they are sound in law.

The plaintiff has presented a motion under St. 1913, c. 716, § 3, asking that a copy of the judge's charge be annexed to the record. This is not an appropriate instance for resort to that statute. This is a petition to establish the truth of exceptions disallowed by a judge of the Superior Court. As pointed out, with a review of authorities, when the case was here at an earlier stage, *Freedman, petitioner*, 222 Mass. 179, the matters open on such a petition are in substance only those set forth in the bill as presented to the judge and disallowed by him.

It is not inappropriate to add, that an examination of the copy of the charge discloses no error, for the reason that the evidence is not set forth with sufficient fullness to show it was not apt and sufficient.

Petition to establish exceptions allowed.

Exceptions overruled.

The case was submitted on briefs.

E. C. Stone, for the plaintiff.

A. Stoneman, A. G. Gould & D. Stoneman, for the defendants.

ISAAC D. POPE & others vs. WILLIAM A. BERRY & others.

Essex. March 6, 1916. — April 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Municipal Corporations, Fire department. Board of Fire Engineers.

Where a town has voted to purchase a fire engine and makes an appropriation for the purpose but does not designate the part of the town where the engine shall be kept and used, it is within the power of the board of fire engineers under R. L. c. 32, § 45, to determine at what fire station in the town the engine so purchased shall be placed and maintained.

PETITION, filed on September 27, 1915, by certain citizens of the town of Danvers for a writ of mandamus directed to the board of fire engineers of that town, commanding them to keep, maintain and care for the combination motor pumping engine, which is

mentioned in the opinion, at the fire station on River Street in the part of the town of Danvers called Danversport, until the town shall vote otherwise.

The case was submitted upon the petition and answer and an agreed statement of facts to *Braleley, J.*, who at the request of the parties reserved and reported it for determination by the full court.

W. E. Clapp, for the petitioners.

B. F. Crowley, (*D. N. Crowley* with him,) for the respondents.

BRALEY, J. The petitioners ask us to decide, whether the board of fire engineers of a town can designate the fire station or engine house at which an engine forming part of the fire apparatus of the town shall be kept, notwithstanding that the vote of the town, when authorizing the purchase of the engine, directed and required that it should be placed and used in a different station or locality.

But this question is not presented by the record. The article in the warrant at the special town meeting called for consideration of the question, Whether "a combination motor pump, chemical and hose carriage, to take the place of the hose wagon, now located at Danversport" should be purchased, or whether "any other action thereon, agreeable to William Coleman and others" should be taken? While a committee was duly appointed "to investigate the proper type of machine and the cost of same and report at some future town meeting," no report ever was made. And, at the adjournment of the annual town meeting under an article to hear and act on the report of the committee on fire apparatus the committee was discharged. A committee was thereupon appointed to purchase a fire pump, and it was voted "that the matter be referred to the finance committee," said special committee to report at the adjournment of this meeting. At the adjourned meeting, on recommendation of the finance committee, an appropriation was made for the purchase of "a motor pumping engine," and the special committee was authorized to buy in behalf of the town. The committee acting under this vote bought the engine which after certain tests was accepted and was placed in the possession and management of the respondents, who are the lawfully constituted board of fire engineers. The subject before the town was the purchase of the engine, and the vote to buy with the necessary appropriation therefor, but without any desig-

nation of any part of the town where the engine should be placed and used, was valid. *Torrey v. Millbury*, 21 Pick. 64, 68. *Hunne-man v. Grafton*, 10 Met. 454, 456. It accordingly became the property of the town and we find nothing in the proceedings which curtails the powers of this board as defined in R. L. c. 32, § 45, giving to them the exclusive care and superintendence of the engines, "hose, fire hooks, ladder carriages and ladders, the buildings, fixtures and equipments, and of all pumps, reservoirs for water and apparatus owned by the town and used for extinguishing fires."

The vote of the board placing the engine at a fire station other than Danversport having been within their statutory authority, the petition for a writ of mandamus "commanding them to locate, keep, maintain and care for said combination motor pumping engine at the fire station on River street, Danversport, and not elsewhere" must be dismissed. *Bowers v. Selectmen of Needham*, 216 Mass. 422, and cases cited.

So ordered.

CATHERINE FITZPATRICK vs. BOSTON ELEVATED RAILWAY
COMPANY.

MARGARET E. FITZPATRICK vs. SAME.

Suffolk. March 7, 1916. — April 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Street railway. Evidence, Presumptions and burden of proof, Absence of witness. Witness. Practice, Civil, Rulings and instructions, Comment on absence of witness.

Where, at the trial of an action of tort against a street railway corporation for personal injuries alleged to have been received when a street car of the defendant suddenly started and caused the plaintiff, who was in the act of alighting, to be thrown to the street, there is direct and inferential evidence from which findings are warranted that the car started in response to a starting signal and that such signal was not given by any one else than the conductor, a further finding is warranted that the signal was given by the conductor although there is no direct evidence to that effect.

In the present case there also was evidence from which the jury would have been

warranted in finding that the car started or jerked after it had come to a full stop for passengers to alight and while the plaintiff was alighting, and that such movement of the car was due to negligence of the motorman in acting without any signal, and it was held that a finding of the jury for the plaintiff was justified. Where, at the trial of an action against a street railway corporation for personal injuries alleged to have been caused by a street car of the defendant starting and jerking after it had stopped to permit the plaintiff to alight, it appears that the action had been tried three times before, that one, who had been the motorman of the car at the time of the accident, who had been discharged by the defendant previous to the first trial and who at the first and second trials had testified for the defendant and at the third for the plaintiff, was not called by either party to testify at the present trial, and there is no evidence that he is in the control either of the plaintiff or of the defendant, the judge should not leave to the jury the question, whether any inference should be drawn against the defendant from the absence of the witness, but should rule, if requested by the defendant, that no inference could be drawn against either the plaintiff or the defendant from the failure to produce the witness.

TWO ACTIONS OF TORT for personal injuries alleged to have been received by the plaintiffs by reason of their being thrown from the back platform of a street car of the defendant by the sudden starting and jerking of the car as they were in the act of alighting. Writs dated June 16, 1913.

In the Superior Court the cases were tried together before *Chase, J.* The material evidence and the exceptions of the defendant are described in the opinion. There was a verdict for the plaintiff in the first action in the sum of \$1,200, of which the plaintiff remitted all in excess of \$500, and for the plaintiff in the second action in the sum of \$6,500. The defendant alleged exceptions.

E. P. Saltonstall, (C. W. Blood with him,) for the defendant.

G. H. Mellen, (W. L. Currier with him,) for the plaintiffs.

PIERCE, J. At the close of the evidence the defendant asked the court to rule:

"1. Upon all the evidence in the cases the plaintiffs are not entitled to recover.

"2. There is no evidence in these cases that the conductor of the car gave the signal for the car to start at the time the plaintiffs were alighting.

"3. There is no evidence in these cases that any negligence of the defendant, its agents or servants caused the car to start or jerk even if the jury should find it started or jerked.

"4. Upon all the evidence in these cases, no inference can be

drawn against either the plaintiffs or the defendant for the failure to produce the motorman of the car."

In its aspect most favorable to the plaintiffs' contention, the evidence warranted the jury in finding the facts to have been substantially as follows: The plaintiffs, a mother and her eight year old daughter, were passengers upon an inbound box car of the defendant. The car stopped, upon the signal of the mother, at the corner of Cambridge Street and Grove Street. After the car had stopped, the mother and daughter walked out through the aisle of the car side by side. They came to the edge of the platform, and were in the "motion of stepping out" when two bells were rung and "the car gave a sudden jerk." The mother testified, "I made another effort to catch the handle of the car, and the second jerk came so quickly, the two jerks just came one after the other, like that — the second jerk threw the both of us out from the top platform to the rock pavings below."

Direct and inferential testimony warranted, if it did not require, the jury to find that the bell was not rung by any person other than the conductor, and because of the elimination of all other agency, justified the conclusion that the conductor did so. *Killam v. Wellesley & Boston Street Railway*, 214 Mass. 283. Moreover, the jury might find that the car started or jerked after it had come to a full stop for passengers to alight and while the plaintiffs were alighting, and that such movement of the car was due to the negligence of the motorman in acting without signal. *McDermott v. Boston Elevated Railway*, 208 Mass. 104. Exceptions to the refusal to give the first, second and third rulings are overruled.

The fourth ruling should have been given. The absent witness, the motorman of the car, was not in the employ of the defendant. He had testified at previous trials of these cases, at the first two for the defendant and at the third for the plaintiffs. He had been discharged by the defendant previous to the first trial. There was no evidence that he was in the control of the plaintiffs or the defendant, or even that he was alive. There was, therefore, no room for inference that his testimony, if given, would favor the contention of either party, or that the failure of either party to produce him was due to fear that his testimony might injure their cause.

The presiding judge after fully and clearly instructing the jury

as to the law applicable to such a situation, left to it the question whether any inference against the defendant should be drawn. This was error, and the exception must be sustained. *McKim v. Foley*, 170 Mass. 426, 428. *Jones v. Boston & Northern Street Railway*, 211 Mass. 552, 555. *Scovill v. Baldwin*, 27 Conn. 316, 318.

So ordered.

CHARLES E. TUCKER vs. CITY OF BOSTON.

Suffolk. March 8, 1916. — April 5, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Civil Service. Boston. Mandamus. Damages, For breach of contract.

Under the provision of St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, § 1, that a person holding office or employment in the classified civil service and sought to be removed "shall be notified of the proposed action . . . and shall, if he so requests in writing, be given a public hearing," the right and the opportunity to claim such a hearing is a condition precedent to removal.

Under St. 1913, c. 672, and St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, § 1, one employed as cashier in the collecting department of the city of Boston cannot be removed from office by a letter from the collector notifying him that he is discharged at the close of business on the date of the letter and that, if requested, a hearing will be granted him within a month; and if such employee, upon receiving such a letter, without asking for any hearing ceases to perform the duties of cashier and attempts unsuccessfully to procure employment elsewhere, he may maintain an action of contract against the city for damages resulting from the breach by the city of the contract of employment, and he is not restricted to the remedy provided by St. 1908, c. 210, § 3, there called "a petition in the form of mandamus" to compel the restoration of his name to the pay-roll.

If at the trial of such an action it appears that at a certain time after his discharge from his employment the plaintiff became ill and physically unable to do the work which he had performed for the city, he is limited in his recovery to the amount of his salary from the date of his discharge to the date of such physical incapacity.

CONTRACT for \$1,733.33 for services as cashier in the collecting department of the defendant, from which the plaintiff alleged that he was discharged illegally. Writ dated February 16, 1915.

In the Superior Court the case was heard by *Jenney, J.*, without

a jury. The material facts found by him are stated in the opinion. The plaintiff requested the following rulings of law, which were refused by the judge:

"1. The letter of June 15, 1914, to the plaintiff by John J. Curley, city collector, constituted a discharge or removal before an opportunity for a public hearing as provided by statute.

"2. The plaintiff having been peremptorily removed or discharged before he was given an opportunity for a public hearing as provided by statute, the discharge was illegal.

"3. The discharge or removal being illegal and not in conformity to the statutes, the plaintiff is entitled to recover."

"6. The defendant has failed to sustain the burden of proof on the question of damages, and therefore the plaintiff is entitled to recover on his declaration for the amount claimed."

The judge found that, if the plaintiff was entitled to compensation to the commencement of the action, he was entitled to recover the amount claimed in his declaration; but that, if he was entitled to recover only until October 1, 1914, the amount of his recovery should be \$758.33 and interest. He found for the defendant and reported the case for determination by this court.

R. E. Buffum, for the plaintiff.

G. A. Flynn, for the defendant.

CROSBY, J. The plaintiff for many years before June 15, 1914, had been employed by the defendant as cashier in its collecting department. On that date, he received from the collector of taxes of the defendant a letter of which the following is a copy:

"City of Boston.

(Seal)

Collecting Department.

City Hall.

June 13, 1914.

Charles E. Tucker,
33 Garden Street,
West Roxbury.

Dear Sir:

You are hereby notified that you are discharged from the services of the City as an employee of this department at the close of business on this date, in the interests of economy and to promote the efficiency of the department.

In compliance with the provisions of Chapter 314 of the Acts

of 1904, as amended by Chapter 243 of the Acts of 1905, a hearing will be granted you, if requested, by the City Collector at his office, City Hall, Boston, on or before 10 A.M., July 14, 1914.

Respectfully,

John J. Curley,
City Collector."

It was admitted that the plaintiff's employment was under the civil service laws of the Commonwealth by virtue of St. 1913, c. 672. Under St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, § 1, the plaintiff was entitled before removal to notice under § 2, "of the proposed action and shall be furnished with a copy of the reasons required to be given by section one, and shall, if he so requests in writing, be given a public hearing, and be allowed to answer the charges preferred against him either personally or by counsel."

It was held by this court in *McCarthy v. Emerson*, 202 Mass. 352, 354, in a somewhat similar case, that "The right to a hearing, with notice of the charges, especially where, as here, the right to be represented at such hearing by counsel is especially secured, contemplates a proceeding in the nature of a judicial investigation, although it is one in which the attainment of substantial justice rather than the observance of any particular formalities is aimed at."

It is plain that the plaintiff has not had the opportunity for such a hearing as is contemplated by the statute.

When the statute provides that "The person sought to be removed . . . shall, if he so requests in writing, be given a public hearing," it is apparent that he cannot be removed unless and until he has had an opportunity to be heard, and that the right to such hearing is a condition precedent to such removal.

The letter from the tax collector to the plaintiff, in clear, unambiguous and emphatic language, states that he is discharged. We have no doubt that such an attempt to discharge was in clear violation of the civil service laws of the Commonwealth, and cannot be upheld by this court. *Ransom v. Boston*, 196 Mass. 248. *Garvey v. Lowell*, 199 Mass. 47. *McCarthy v. Emerson*, 202 Mass. 352.

This conclusion is not affected by the finding of the judge that

the city collector did not act in bad faith in undertaking to secure the removal of the plaintiff.

It follows that the plaintiff's first, second and third requests should have been given. The fourth request was given, while the fifth and sixth were expressly waived by the plaintiff at the argument before this court.

The defendant contends that the plaintiff's remedy, if he has any, is under St. 1908, c. 210, § 3, but this contention cannot be sustained. It does not appear that the plaintiff's name has been illegally removed from the pay-roll or that the Civil Service Commission has refused to certify such pay-roll. The plaintiff, in this action, seeks to recover not his salary as such, but a judgment for breach of his contract of employment.

The question remains, What amount is the plaintiff entitled to recover? The judge found that "the plaintiff used due diligence to secure other employment down to some time in the September following but did not succeed in obtaining any employment. Since October 1, 1914, because of ill health he has not been physically able to do the work which he performed for the city of Boston prior to June 15, 1914, or to perform other work reasonably adapted to his abilities."

In order that the plaintiff may be entitled to recover for the whole time down to the bringing of his action, we think it must appear that during all that time he was ready, able and willing to perform his duties and render the services for which he was employed. As it is found that by reason of ill health he was unable to do the work after October 1, 1914, which he had performed for the defendant before June 15, 1914, there is no doubt that the defendant is absolved from liability after the date of such inability of the plaintiff. *O'Connor v. Briggs*, 182 Mass. 387. *Harrison v. Conlan*, 10 Allen, 85.

In accordance with the terms of the report, judgment is to be entered for the plaintiff for \$758.33 and interest from the date of the writ.

So ordered.

EDWIN WILCOCK vs. MASSACHUSETTS BONDING AND INSURANCE COMPANY.

Suffolk. March 8, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Insurance, Fidelity. Bond. Contract, What constitutes. Agency, Scope of authority. Waiver.

Where a bond of a surety company, insuring the fidelity of an employee of the insured, contains a provision that it shall "be invalid and of no effect unless signed by the Employee," and a provision that no one of its provisions shall "be deemed to have been waived by or on behalf of" the insuring company "unless the waiver be clearly expressed in writing, over the signature of its President or Vice-President and Secretary or Assistant Secretary and its seal thereto affixed," and following such provisions are agreements purporting to be made by the employee and an *in testimonium* clause in which his name is mentioned and a blank place is marked for his signature, the requirement of the signature of the employee is not waived by the insurer by a letter to the insured, not signed by any of the officers authorized to make such a waiver for the corporation and not shown to have come to their knowledge, in which the bond, unsigned by the employee, is enclosed and which states, "Enclosed please find duly executed bond . . . which we trust will be found in proper form. Enclosed also find bill for premium on this bond, on which we trust you will favor us with an early remittance," although the insured relies on the letter and makes no attempt to obtain the signature of the employee.

CONTRACT upon a bond insuring the fidelity of an employee of the plaintiff. Writ dated November 13, 1909.

In the Superior Court *Quinn, J.*, upon an opening statement and offer of proof by the plaintiff, the material portions of which are described in the opinion, ordered a verdict for the defendant and reported the case for determination by this court.

J. A. Daly, (C. T. Cottrell with him,) for the plaintiff.

F. W. Bacon, for the defendant.

PIERCE, J. This action was brought on a bond, insuring the fidelity of one James Y. Thompson as custodian of a quantity of goods at Millbury, Massachusetts, for the plaintiff.

The answer of the defendant alleges, "that the bond described in the plaintiff's declaration was never signed by the principal, James Y. Thompson, and therefore the bond is now void."

The plaintiff, in anticipation of such a defence, set up in his declaration "that he has kept and performed all the conditions by him to be performed except and in so far as the same have been waived by said defendant expressly or by implication."

As shown by the report, the facts are these: In May, 1908, the plaintiff owned a quantity of crash which he stored in a mill building in Millbury, Massachusetts. Thompson was in the employ of the plaintiff, and as such had sole charge and custody of the storehouse and its contents. The plaintiff, desiring to go to Europe and feeling the need of protecting himself during his absence, applied to the defendant for a bond insuring the honesty of Thompson. Before issuance of the bond, Thompson was required to make an application or statement on a blank furnished by and delivered to the defendant company.

It is agreed, that the statement in the report that "This application refers to the bond above mentioned, and the bond in turn refers to the application or statement of said Thompson and recites that the same is made a part of the bond" is an inadvertent and erroneous statement of fact.

Upon receipt of the application blank, duly filled in, signed and sealed, the defendant executed the guaranty bond on which this action is based and sent it to the plaintiff with the following letter: "Enclosed please find duly executed bond 1456, James Y. Thompson, agent in your employ, which we trust will be found in proper form. Enclosed also find bill for premium on this bond, on which we trust you will favor us with an early remittance." The letter was signed in the name of the defendant by one George W. Berry, who, it was agreed, was one of the office force with duties in part to write letters of this kind, to see that bonds were delivered, and to do other clerical work.

The bond contained the following provision: "This bond is issued on the express understanding that the Employee has not within the knowledge of the Employer at any former period been a defaulter, and will be invalid and of no effect unless signed by the Employee," which was immediately followed by a provision which read "No one of the above conditions, or the provisions contained in this Bond, shall be deemed to have been waived by or on behalf of said Company unless the waiver be clearly expressed in writing over the signature of its President or Vice-Presi-

dent and Secretary or Assistant Secretary and its seal thereto affixed." *

The plaintiff received the bond and letter, "relied on the same and made no attempt to obtain the signature of Thompson to the bond itself, and never has obtained the signature of Thompson to this bond."

It is to be observed that there is no evidence that the plaintiff was ignorant of the above condition or did not read the bond and perceive the absence of Thompson's signature. And the statement that he relied upon the same (letter) is not a finding that he was thereby induced to close his eyes and understanding to the situation that confronted him. "The plaintiff admits that he has never received from defendant a waiver 'clearly expressed in writing over the signature of its President or Vice-President and Secretary or Assistant Secretary and its seal thereto affixed'; unless the delivery of the bond itself constituted such waiver."

Upon these facts, which the plaintiff offered to prove, the presiding judge ordered a verdict for the defendant, under a stipulation of the parties that judgment should be entered for the defendant if the order was right, otherwise, that the case should stand for trial.

Two possible issues are presented: 1. Was the delivery of the unsigned bond a waiver of the condition that it should not become operative as a bond until signed by the employee? 2. Was the defendant estopped by the terms of the letter and by the receipt of the premium to deny its obligation and from insisting upon the condition?

There is a total lack of evidence that the defendant or any one of its officers authorized to waive the conditions upon which the bond would become operative had knowledge that the employee had failed to sign the bond. The clerk, who delivered the bond to

* Following the above described paragraphs was a paragraph containing agreements made by the "Employee" and an *in testimonium* clause and blank places for signatures. The *in testimonium* clause began, "In witness whereof, the said James Young Thompson (the said Employee) hath hereunto set his hand and seal." At the left of the blank line upon which the employee was to sign, which had the word "Employee" printed under it, was another blank space, above which were the words "Signed, sealed and delivered by the said Employee in the presence of."

the plaintiff in the performance of his clerical duties, was not one of the officers who was in terms authorized to bind the defendant by his official act. Waiver presupposes knowledge of the rights claimed to be waived and an intent to relinquish them. *Smith v. Dennie*, 6 Pick. 262. *Fox v. Harding*, 7 Cush. 516. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 391.

While it is admitted that the plaintiff relied upon the letter, there is nothing in its statement that the bond was duly executed to estop the defendant from claiming that the plaintiff knew of the condition precedent and of its non-performance. Indeed the statement, "which we trust will be found in proper form" was by way of caution, a direction or suggestion to the plaintiff to look out for himself. The letter contains no statement that the bond was duly executed on behalf of the employee as was the case in *General Railway Signal Co. v. Title Guaranty & Surety Co.* 203 N. Y. 407.

The order of the presiding judge was right. And in accordance with the terms of the report, judgment is to be entered for the defendant, and it is

So ordered.

LEAD LINED IRON PIPE COMPANY vs. INHABITANTS OF
WAKEFIELD.
SAME vs. SAME.

Middlesex. March 9, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Municipal Corporations, Officers and agents, Superintendent of streets. *Public Officer*. *Evidence*, Relevancy and materiality.

Where a town, which had not authorized the election of road commissioners or a surveyor of highways, voted "That the board of selectmen be instructed to employ a competent engineer, who shall be a practical road builder, as superintendent of streets," such vote has merely an advisory, and no mandatory effect.

Under R. L. c. 25, § 86, a superintendent of streets, appointed by the selectmen of a town which has not authorized the election of road commissioners or a surveyor of highways, although he acts "under the direction of the selectmen," has the powers, performs the duties and is subject to the liabilities and penalties of surveyor of highways and road commissioners, and therefore he is a public officer and is not an agent of the town.

On a review of the evidence at the trial of an action of tort by a landowner against a town for injuries caused by the flooding of the plaintiff's land caused by the overflowing, at the time of an unusual rainstorm, of a natural watercourse into which the town had caused surface drainage from streets to be emptied, it was *held* that the evidence was clear and convincing that the overflowing was caused by the clogging of a culvert by the falling of a capstone, that there was no evidence to show how long the capstone had been dislodged or that the culvert when unobstructed was not adequate in form and dimension to provide for the full flowage of the stream; and that, if there were any negligence in not discovering that the capstone had fallen into the culvert or in failing to recover it, it was negligence of the superintendent of streets, who under R. L. c. 25, § 86, was a public officer for whose negligence the town was not liable.

Evidence that the superintendent of streets worked under the direction of the selectmen was *held* not to be relevant or material in such an action.

PIERCE, J. These are two actions of tort, depending upon the same state of facts, to recover for the flooding of the plaintiff's premises with water.

The material facts, as they appear in the bill of exceptions, are as follows: A natural watercourse traverses and drains the plaintiff's premises. It has its source in a spring on private land, flows in an easterly direction, runs along the northerly boundary of the plaintiff's premises; thence through a culvert under North Avenue, a public way; thence through land bought by the defendant March 11, 1913, for school purposes; thence under Main Street, a public way; thence through an open walled ditch to Richardson Avenue, a public way; thence along land of a branch of the Boston and Maine Railroad through an open concrete ditch, through an upright wooden grating into a closed culvert; thence through private land to the Saugus River.

The town, from time to time, established surface drainage in the various streets, all within the watershed of the brook, and emptied the surface drainage into the brook through pipes and otherwise, both above and below the plaintiff's premises. The town appropriated the money for this purpose and the superintendent of streets did the work under the instruction of the selectmen. The town did not authorize the election in 1912, 1913 and 1914 of road commissioners, or surveyor of highways, but voted in March, 1912, "That the Board of Selectmen be instructed to employ a competent engineer who shall be a practical road builder, as Superintendent of Streets." The selectmen appointed a superintendent of streets in June, 1912. There was a superintendent of streets appointed by the selectmen in the years that followed,

though there was no evidence of any subsequent vote of the town in reference thereto.

The plaintiff contends, that the superintendent in the defendant town was an agent of the town and not a public officer, because of the vote of the town above quoted. The answer to this argument is that the selectmen are required, in default of town action, to appoint a superintendent of streets by R. L. c. 25, § 85, who shall have the powers, perform the duties and be subject to the liabilities and penalties of surveyors of highways. *Prince v. Lynn*, 149 Mass. 193. The vote of the town is more than advisory was void. That a surveyor of highways is a public officer and not a town agent requires no citation of authority.

A former superintendent of streets had cleaned out parts of the brook in years previous to 1912, under instructions from the board of selectmen, but nothing had been done to the brook since that time by the present superintendent of streets, except to clean out the culvert under Main Street. The brook was not a main drain within the meaning of Pub. Sts. c. 50, §§ 1 to 19, and amendments in addition thereto. *Smith v. Gloucester*, 201 Mass. 329.

On March 2, 1914, after two days of severe wind and rain, surface water overflowed the gutters and filled the streets and cellars of houses along the streets. As a result, the brook and the low land in the vicinity of the brook were flooded; "water came from the brook and flooded the plaintiff's premises to a depth in some places of from fifteen to eighteen inches, and went over the top of North Avenue from the plaintiff's premises on to the Wakefield estate."

On April 16, 1914, there was another flood under almost the same conditions except the storm was not so severe and the plaintiff's property was not so much damaged. Boards, sticks of wood and debris were carried into the North Avenue culvert, became lodged there and prevented the free flow of water.

During the last storm, the superintendent of streets with his men dug into the culvert from the surface of North Avenue, took out the boards, plank and other material which had lodged there and was retarding the flow of water.

The banks of the brook above the culvert are five or six feet wide. The opening to the culvert is four feet wide by two and one

half feet high. When opened, rubbish was disclosed at the "up-stream mouth." A foot below the opening a gas pipe crossed the culvert at right angles to it, with a space of three inches between the top of the pipe and the bottom of the culvert capstone. There was evidence that rubbish was taken out between the inlet and the gas pipe. This pipe was laid and owned by the defendant, which owns a gas plant and furnishes gas for profit. Fifteen feet below the place where the gas pipe crossed the culvert, and further down stream, rubbish had collected against a dislodged capstone of the culvert. The superintendent removed the rubbish at the inlet and between it and the gas pipe without result; he then removed the rubbish collected against the capstone, and the "water went down with a rush." There is no evidence that the gas pipe had any appreciable effect in damming the waters, and the evidence is clear and convincing that the fallen capstone did, in combination with the floating boards and other débris, have that result.

There is nothing in the record to indicate the length of time the capstone had been dislodged, or to rebut the inference that it may have fallen during, and because of, the unusual rainstorm. There is also no evidence that the culvert, when unobstructed, was not adequate in form and dimension to provide for the full flowage of the stream.

Upon the reported facts, if there was any negligence in not discovering that the capstone had fallen into the culvert, or in failing to remove it, or in not keeping the waters reasonably free of floating boards, sticks or wood and other rubbish, it was that of the superintendent of streets in his individual capacity and not as agent of the town. *Murphy v. Needham*, 176 Mass. 422. *Johnson v. Somerville*, 195 Mass. 370, 382. *Smith v. Gloucester*, 201 Mass. 329. *Dupuis v. Fall River*, ante, 73.

The plaintiff was not prejudiced by the refusal to permit him to show that all the work of the superintendent of streets was under the direction of the selectmen. The mere fact that the selectmen may give such general directions as shall cause the money entrusted to the superintendent to be judiciously expended, does not make the town liable for his acts or defaults while performing or failing to perform the acts required of him by law. *Butman v. Newton*, 179 Mass. 1. R. L. c. 25, § 86, requires that he shall act "under the direction of the selectmen."

The ruling of the presiding judge * was right and the exceptions of the plaintiff thereto must be overruled.

So ordered.

J. J. Butler, for the plaintiff.

M. E. S. Clemons, for the defendant.

WILLIAM HUNT & another vs. MARY E. SIMESTER, executrix.

Suffolk. March 10, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Judgment, Petition to vacate. *Bond*, Supersedeas. *Practice*, *Civil*, Amendment.

On a petition, filed under R. L. c. 193, §§ 15-17, to vacate a judgment in the sum of over \$15,000, a judge of the Superior Court issued an order that notice issue and that, upon the filing of a bond for \$5,000, a writ staying execution should issue. The error in accepting a bond insufficient in amount was called to the attention of the judge at the hearing on the return day of the notice, and thereupon the petitioner proffered a bond sufficient in character and amount, which the judge, subject to an exception by the respondent, approved. Thereafter the judge ordered that the judgment be vacated and that a writ of supersedeas should issue. *Held*, that, the hearing upon the petition being still open at the time of the acceptance of the proper bond, the court had power and authority to correct the error in the acceptance of the insufficient bond by the acceptance and filing of the new bond which was legally sufficient.

The granting of a petition for the vacation of a judgment rests largely in the discretion of the judge.

In the present case, where such a petition was granted upon evidence from which it appeared that the attorney for the defendant in an action of contract, returnable in the Superior Court in the county of Suffolk, on the day before the last day within which an appearance could be entered for the defendant went to the office of the clerk of the court, that, having searched for the case in the general index of pending cases without success because the case was not there, he asked assistance of a subordinate in the office to whom he handed the summons, that such subordinate after an inquiry reported that the case was not entered, that the attorney then searched the list of non-entered writs without success and departed without leaving an appearance card with the clerk, and that the case was properly listed in an index called a "current index," that the defendant was defaulted for non-appearance and that the judgment sought to be vacated was entered against him, it was *held*, that it could not be said that the judge in vacating the judgment had exercised his discretion improperly.

* *Brown, J.*, who ordered a verdict for the defendant.

PETITION, filed in the Superior Court on September 23, 1915, for the vacation of a judgment obtained by the respondent against the petitioners.

In the Superior Court the petition was heard by *Wait, J.* The material facts are stated in the opinion.

The judge granted the petition on the terms, and subject to the respondent's exception, described in the opinion, and reported the case for determination by this court.

W. R. Bigelow & V. J. Loring, for the respondent.

F. P. Cabot, for the petitioners.

PIERCE, J. The writ in this action, without attachment of property or bond to dissolve an attachment, was entered in the Superior Court of Suffolk County on August 2, 1915.

The defendants, the present petitioners, had accepted service of the writ. On August 11, 1915, the day before the time for an appearance would expire, the defendants' attorney went to the office of the clerk of the Superior Court for the purpose of filing an appearance if the writ had been entered. He testified that he had examined the indexes and was unable to find the case; that the "defendants' index" was missing; that he went to one of the clerks, a male clerk at the counter, and told him that he was unable to find the case; that the clerk said, "You go right inside and they will help you;" that he went inside, presented the summons to a clerk, who came forward to meet him; that he said to her, "I have been unable to find that this case has been entered. Will you see if you can find it;" that she went out of sight at first, and came back and said, "The index is inside. One of the clerks has it working on it, and I will go and ask him;" that she went inside, to one of the desks, where this clerk was working on the index, and came back with the information that the case had not been entered; that he then looked among the non-entries to see if the writ was there, and, not finding it, went back to his office; and on August 14, 1915, he went on a vacation.

Other testimony established that there are in the clerk's office a general index of pending cases and an index of current cases, and that an examination of the last named index would have shown that the entry of the writ had been duly made.

It is argued that inquiry should have been made of the entry

clerk, at the sheriff's office or of the plaintiffs' counsel, if the case was not found among the non-entries.

On August 23, 1915, the plaintiffs recovered judgment against the defendants on default for non-appearance for the sum of \$15,575.30 damages, and \$22.54 costs.

On September 9, 1915, execution issued on said judgment.

On September 23, 1915, the petitioners, defendants, filed this petition under R. L. c. 193, §§ 15, 16, 17. The court ordered that notice issue returnable on September 30, 1915, and that, upon the filing of a bond for \$5,000, supersedeas should issue. On September 25, 1915, a bond for \$5,000 was filed and a writ of supersedeas issued.

On September 30, 1915, before the introduction of any evidence upon the petition to vacate the judgment, the judge's attention was directed to the manifest irregularity and error in the order whereby a writ of supersedeas had issued upon the filing of a bond with the penal sum less than the amount of the judgment sought to be vacated. The petitioners proffered a bond in substantially the same form as the former bond, but in the penal sum of \$20,000, and thereupon, on October 2, 1915, the judge made the following order thereon: "Bond filed and approved and if the court has authority to so order, this bond may stand as substitute for the bond heretofore given under the supersedeas heretofore issued." Thereupon the court made the following order upon the petition to vacate judgment: "Judgment vacated and supersedeas ordered to issue." On October 2, 1915, a second writ of supersedeas was issued staying the respondent's execution. On October 5, 1915, the respondent filed exceptions and on October 14, 1915, claimed an appeal.

By agreement of the parties the case was reported upon the following terms: "If the full court shall be of opinion that upon all the record as matter of law the order to vacate the judgment is erroneous it is to be set aside and such other or further order shall be made as justice requires."

The hearing upon the petition to vacate the judgment was open at the time the second bond was approved, and no good reason is shown why the court, having jurisdiction of the case, had not power and authority to correct its error in receiving the first bond by the acceptance and filing of an admittedly legal and sufficient

new bond. Had the judgment been vacated upon the filing of the first bond, and the case brought to the full court upon error and appeal, the order of the Superior Court must have been set aside, the judgment reversed and the petition remanded to the Superior Court for further proceedings. *Davis v. National Life Ins. Co.* 187 Mass. 468. And in that event, the Superior Court would have been empowered to make an order like the one in fact made. There would seem to be no necessity for such circuitry of action.

The granting of a petition for the vacation of a judgment rests largely upon the discretion of the judge, and we cannot say, upon the reported facts that the petitioner or his attorney was so negligent in learning the facts and in failing to enter an appearance to the respondent's writ, that the judge could not as a matter of law grant the petition to vacate the judgment. *Boston v. Robbins*, 116 Mass. 313. *Keene v. White*, 136 Mass. 23. *Soper v. Manning*, 158 Mass. 381.

No errors appear in the record, and the order must be affirmed.

So ordered.

SARAH M. LANGLEY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 10, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Of street railway. Agency, Scope of employment.

Where a woman passenger in the exercise of due care is standing upon the platform of a terminal station of an elevated railway and two employees of the railway company, who have finished their work for the day and are waiting on the platform to take a car to carry them home or elsewhere for their own purposes, either while making passes at one another by way of joke or in stepping back to avoid a pass or blow from a stranger, negligently bump into the woman and push her off the platform into a pit, the railway company cannot be found to be liable for her injuries thus sustained; because the two men were not in a legal sense the servants or employees of the company when their negligent acts were committed.

PIERCE, J. On December 3, 1912, the plaintiff, a passenger, in the exercise of due care, while standing upon the platform of the

elevated terminal station of the defendant company at Sullivan Square, was unintentionally jostled and thrown down, to her injury, under circumstances that would warrant a finding of the following facts:

Upon the platform, near the plaintiff, two men in uniform, in the general employment of the defendant, but not on duty, were awaiting the coming of the surface cars which ran to Everett. Their services for the day were over; they were not in the pay of the defendant; their time was their own, they could use it as they saw fit; they were at liberty to go as and where they pleased, and they were about to pass over the defendant's road for their own business or pleasure. While waiting for the car to come, the two men, in sport, moved back and forth over an uncrowded space as great as a car's length, scuffling, making passes at each other, laughing and joking. A stranger, apparently under the influence of liquor, walked up to the two men and, uninvited, attempted to join in the fooling. In evading or dodging a pass or blow of the stranger, one of the two men stepped back and bumped into the plaintiff.

At the close of the evidence, the defendant asked the presiding judge * to rule:

"First. That the defendant was entitled to a verdict.

"Second. That Gray and Dugan were passengers.

"Third. That there was no evidence of any unseemly or improper conduct on the part of Gray and Dugan as passengers which called for interference on the part of the defendant's officials.

"Fourth. That if Gray and Dugan, after they had finished their work on the Elevated Division and had come to another part of the station to take cars upon business of their own, were still nevertheless servants of the defendant to the extent that the defendant was liable for their conduct as for the conduct of an agent, nevertheless there was no evidence of any negligent conduct on the part of said servants.

"Fifth. That, if the jury found as a fact that Gray and Dugan had finished their day's work and were on their way home, the

* Dana, J., who, after a verdict, for the plaintiff, reported the case for determination by this court.

defendant would not be liable for their acts as for the acts of servants and agents.

"Sixth. That there is no evidence that in the course of any negligent conduct on the part of Gray or Dugan, Gray hit the plaintiff, and knocked her into the pit."

None of these requests was given or refused, save as may be inferred from the charge and from the terms of the report.

In the charge the presiding judge stated, without reported objection or exception, "Now, whatever you may find that those men were doing, whether they were doing what the plaintiff claims they were doing, or whether they were doing what the defendant claims they were doing, at the time of the accident, and before the accident, the court is of the opinion, that the defendant was not negligent because no official of the defendant interfered with the conduct of those two men. The court is of opinion that, upon the evidence in this case, there is no evidence sufficient to present a case calling for interference on the part of the street railway company's officials. And the court says this in view of the time, when this accident took place, the description given as to what the men were doing, the condition of the platform, the number of passengers upon it, the hour of the day, and so forth. There is no description from any witness, so far as the opinion of the court goes, of anything so disorderly and so reprehensible as to call for affirmative action by any official of the road. So that anything of that kind is out of the case." Thereupon, the ruling became the law of the case, and there was established as a fact that there was not "anything so disorderly and so reprehensible as to call for affirmative action by any official of the road." See *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341.

As regards the action of the stranger, the court charged the jury, without objection or exception, and with the apparent approval of the plaintiff, "if those two men in uniform were upon the platform, perhaps talking jocosely and enjoying themselves, if those two men were present on the platform, and a man partially under the influence of liquor or not under it, came up to them, and this man came up to them, and said to Mr. Gray, 'Where can I get a car to Medford?', and Mr. Gray asked him which he wanted, there were several cars, and this man said, 'It is none of your business,' and then made a pass at him, and

Mr. Gray undertook to get out of the way by making a backward step suddenly, as anybody would under the circumstances, and accidentally hit the plaintiff, knocking the plaintiff into the pit, then, in that case, if the accident happened substantially as I have outlined, and as the defendant says that it happened, then there is no liability on the part of the defendant, and there must be a verdict for the defendant." As the jury found for the plaintiff, it must have found as a fact under the instructions, that the accident was not attributable to wrongful conduct of the stranger.

The judge then charged the jury, "It is contended by the defendant that these two men in uniform at the time of the accident were not actually engaged in service, that is to say, that, at the time of the accident, they had got through their day's work, and were on their way home. They were free to do as they liked, and they were going home as any passengers would go home. Now, on the question whether the defendant would be responsible for the negligence of either of these parties if he was negligent, the court rules that the company would be liable, if either of those men in uniform was negligent in the same manner as if he had not got through his work for the day." Again, "Were they employees of the defendant company at the time of the accident? That is, not were they engaged in their actual service, but were they in the general employment of the company at the time of the accident? If you find that they were, and you find that either of them, using the standard test of due care, was negligent, and that such negligence caused the plaintiff to fall into the pit, the plaintiff has made out a case. Otherwise, the plaintiff has no case." Under this instruction, the jury found for the plaintiff, and, therefore, found one or both of the men negligent.

But it does not follow that the defendant is liable therefor. While the carrier is bound to exercise the utmost care and diligence consistent with the proper management of its business to protect its passengers from the negligence, violence and insults of their fellow passengers and strangers, as also from the negligence, violence and insults of its servants and employees, whether wilful and malicious or not, and whether or not within the scope of the agent or servant's employment, nevertheless, to hold the carrier liable for the acts and defaults of the servant as servant or as employee, it must be proved that the person so acting or failing to

act was, in a legal as distinguished from a popular sense, in the employment of the defendant at the time of the acts complained of. *Bryant v. Rich*, 106 Mass. 180, 188. *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 69. *Gooch v. Citizens Electric Street Railway*, 202 Mass. 254. *Hayne v. Union Street Railway*, 189 Mass. 551, 554. *Jackson v. Old Colony Street Railway*, 206 Mass. 477.

It follows that the fifth request should have been given. And, as it is clear that the men were not at the time of the injury in a legal sense the servants or employees of the defendant, the first request should also have been given.

It follows that the exceptions must be sustained, and in accordance with St. 1909, c. 236, judgment should be entered for the defendant.

So ordered.

T. E. Flanagan, for the plaintiff.

J. E. Hannigan, for the defendant.



WILLIAM A. FRY vs. POSTAL TELEGRAPH CABLE COMPANY.

Essex. March 10, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, In maintaining wires, In use of highway.

If a small boy, who is in the charge and care of his sister ten years of age, is left by his sister standing on an uneven grass plot about fifteen feet wide, which is a part of a public highway that has no sidewalk at that place and is at the side of the travelled road, while his sister and a companion of the same age turn their backs on him and go a few feet away to pick flowers, and the boy is struck and injured by a loose guy wire or wire cable swinging from a telegraph pole, in an action by the boy against the telegraph company maintaining the wire for his injuries so sustained, it can be found that the boy was in a place on the highway where he had a right to be and that his sister was in the exercise of as much care and prudence in the protection of her brother as reasonably might be expected on the part of a girl of her age.

If a telegraph company leaves a loose guy wire or wire cable fifteen or twenty feet long hanging from one of its telegraph poles over an uneven grass plot about fifteen feet wide that is part of a public highway without a sidewalk at the side

of the travelled road, so that the end of the wire or cable can be swung as much as five feet by an ordinary wind, and it remains in this condition so long that children in the neighborhood get in the way of swinging on it from day to day, putting a foot in the end that is curled up, in an action against the company by a child who was injured by having the wire or wire cable swing against his eye, it can be found that the defendant was negligent in failing to discover the condition of the wire and allowing it to remain loose.

TORT by a minor, by his next friend, for personal injuries sustained by the plaintiff from being struck in the eye by a loose guy wire or wire cable hanging from a telegraph pole owned and controlled by the defendant on August 4, 1912, on Western Avenue, a public highway in Lynn. Writ dated August 28, 1912.

In the Superior Court the case was tried before *Brown, J.* The place of the accident is described in the opinion. At the time of the accident the plaintiff was in charge of his sister Lucy, who was ten years old, and with them was Annie Burchell, also about ten years old.

Annie Burchell testified: "We were coming across the bridge. I saw this wire and it was swinging, and we were going down to the water, and as we were going past the wire there, between the two posts, Willie stopped and Lucy [Fry] and I went along, and we didn't know Willie got hurt until we heard him cry, and then we turned round and we saw the wire swinging out, and we noticed Willie's eye was bleeding. After Willie got hurt I saw the wire swinging out over the water. . . . When the wire struck Willie, Lucy and I were going down there near the tree, down the other way. We were about ten feet away. When we were coming across the bridge there were a crowd of children swinging on the wire. When we were over near there the children who were swinging had gone."

On cross-examination she testified, "Mrs. Fry knew we were going to the Fay estate to pick flowers. She did not know or expect we were going into this place where the two poles were. When we crossed over the bridge and come in sight of the two poles there were about nine children there. We saw some flowers and Lucy and I went to get them. We told Willie to stay there. We did not have to go through a fence. There was no fence between the travelled part of the street and those two poles. When we told Willie to stay there I don't know just where we were, we were down in a place. I don't know where the other children

were then, — they had all gone by that time. We were about nine or ten feet from the two poles when we told Willie to stay there, — and went to get flowers. The flowers were farther down, up near the billboard, not near the water, — they were farther from the line of the road than the poles were. We turned our backs to Willie when we went to get the flowers. When we heard him call, Willie had moved back a little bit out of the way of the wire, just a few steps from where he was, I should say about five feet from the first pole, toward the road, that is, where he was when he was hit. The children who were playing about had all left the place where the poles were before we went in. The wire was about fifteen or twenty feet long, — it was several small wires twisted together. I think there was wind enough to make that wire swing five feet. I had seen children swinging on that wire before. I had swung on it before, but not that day. Willie did not move from the place where we left him until he got hit. The wire was swinging when we went in there. It kept on swinging all the time. We left Willie standing five feet from the poles, — not nearer one pole than the other. He was four feet away; when he got hit he moved back a foot."

The plaintiff's sister Lucy testified, "I am a sister of Willie Fry, — was with him at the Floating Bridge when he got hurt. When he got hurt he was about running in the centre of the two posts up near the fence on the centre line between the two posts up near Mrs. Beardsey's fence. The first I knew he was hurt I was about two or three feet from him and picking some flowers that was there. I heard a scream, looked around and saw his eye was bleeding. We were going to the Fay Estate. . . . The first time I saw the wire we was coming over the bridge and seeing nine or ten other children swinging on it. When we were there near the posts I saw the wire. After it struck Willie I saw it, — it was swinging out over the pond. Nobody was on it then, — nobody had hold of it. I don't believe there was any other children near me when Willie was struck."

Other evidence is described in the opinion.

At the close of the plaintiff's evidence, upon the defendant's request, the judge ordered a verdict for the defendant, and reported the case for determination by this court, the parties having stipulated that, if upon the evidence the jury would be warranted

in finding for the plaintiff, judgment was to be entered for the plaintiff in the sum of \$100 as of the date of January 19, 1916; otherwise, judgment was to be entered for the defendant.

A. T. Cusack, for the plaintiff.

G. P. Wardner, for the defendant, submitted a brief.

CROSBY, J. The plaintiff, a minor, brings this action by his next friend, to recover for personal injuries alleged to have been received by reason of being struck in the eye by a guy wire hanging from a telegraph pole, owned and used by the defendant.

The place of the alleged accident was on Western Avenue, a public highway in Lynn, at a point near the northerly end of the Floating Bridge, so called. The bridge is a part of the highway and is about thirty feet wide. The highway is sixty-six feet wide where the bridge joins it and the shore of the pond. A projection of the side lines of the bridge would mark the travelled part of the highway; between the travelled road and the side lines of the highway is an uneven grass plot about fifteen feet wide. There is no sidewalk at this point.

The plaintiff was injured while on this grass plot. The telegraph pole, upon which the wire hung, was close to the rail about four feet from the end. We are of opinion that the plaintiff, when he was injured, was in a place upon the highway where he had a right to be.

While the report recites that the plaintiff was a minor, his age at the time of the accident does not appear. There was evidence, however, that he was in charge of his sister who was ten years old. In view of the evidence, we are of opinion that it could have been found that she exercised as much care and prudence in the protection of her brother as might reasonably be expected of a girl of her age.

There was evidence tending to show that, just before the accident, "there were a crowd of children swinging on the wire;" that children had been seen swinging on the wire before the day of the accident; that it was a cable wire with five or six strands, and that the end was curled up, "where they [the children] put their foot in and swung."

In view of the length of time during which it could have been found that the wire had been hanging from the pole, we are of opinion that the jury would have been warranted in finding that

the defendant was negligent in failing to discover the wire and to secure it.

In accordance with the terms of the report, let the entry be
Judgment for the plaintiff in the sum of \$100.

ARTHUR P. HOMER vs. BAKER YACHT BASIN, INCORPORATED.

Suffolk. March 13, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Contract, Construction, Performance and breach. Damages, In contract.

In an agreement to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, a requirement of delivery within a reasonable time is implied.

In an action on such a contract, evidence that within five months from the date of the order a notice was given by the seller to the purchaser that the engine was ready for shipment, that the notice was followed eleven days later by a letter, stating that, no reply having been received, the shipment, in the absence of notification to the contrary, would be made a week after that, and that the engine was shipped in accordance with this statement, was *held* to warrant a finding that the contract was performed by the seller within a reasonable time and that he was entitled to recover damages for the defendant's refusal to receive the engine.

It also was *held* that, in assessing damages for the breach of this contract, the plaintiff's loss of profit and the freight charges paid by him properly might be included.

DE COURCY, J. On conflicting evidence, the trial judge* was warranted in finding that the defendant agreed in writing to purchase from the plaintiff a Sterling engine "f. o. b. Buffalo." The agreement was dated November 20, 1913, and a requirement of delivery within a reasonable time would be implied in the absence of a specified date therefor.

On April 16, 1914, the defendant was notified that the engine was ready for shipment and was requested to send shipping instructions. The plaintiff, receiving no reply, by his letter dated April 27 informed the defendant that he would make the ship-

* *Jenney, J.*, by whom the case was heard without a jury. He found for the plaintiff in the sum of \$322.28; and the defendant alleged exceptions.

ment on May 4 unless notified to the contrary. The engine was shipped accordingly, but the defendant refused to receive it.

It was not in dispute that the engine was in accordance with the specifications. There was evidence to warrant a finding that it was delivered within a reasonable time after the execution of the contract; also that in making the sale the plaintiff was acting not as agent for the Sterling Engine Company but in his own behalf, and that the engine was shipped direct from the manufacturer to the defendant at the request of the plaintiff as owner.

The damages found by the judge included the plaintiff's loss of profit and the freight charges paid by him, and we cannot say that the finding was not justified by the evidence. The rulings requested * were refused rightly.

Exceptions overruled.

F. E. Shaw, for the defendant.

F. R. Mackenzie, for the plaintiff.

CATHERINE G. LITTLE, administratrix, *vs.* MASSACHUSETTS
NORTHEASTERN STREET RAILWAY COMPANY.

Essex. March 13, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Evidence, Declarations of deceased persons, Opinion.

Under R. L. c. 175, § 66, which provides that "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made [with other requirements] upon the personal knowledge of the declarant," a declaration of opinion by a deceased person cannot be admitted, even when such person, if living, would be allowed to testify to the opinion inquired about. In an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, the physician who treated the intestate after the injury that was alleged to have caused his death was not living at the time of the trial, and the plaintiff was allowed, subject to the defendant's exception, to answer the question, "What did [the deceased physician] say was the cause of his [the intestate's] condition?" To which the plaintiff answered,

* The rulings requested were in substance that the defendant did not enter into the contract set forth in the plaintiff's declaration and that upon all the evidence the plaintiff could not recover.

"He said the accident, being thrown out of the carriage." There had been evidence that the intestate for a long time before the accident had been suffering from hardening of the arteries, which might have resulted in his death even if the accident had not happened. *Held*, that the admission of the question and the answer in regard to the opinion of the physician was harmful error which required the sustaining of the exception.

TORT, by the administratrix of the estate of Edwin C. Little, for the suffering and death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant's servants on September 21, 1911, in operating a car of the defendant on the highway running between the towns of Merrimac and Amesbury noisily, improperly and recklessly, whereby the horse that was being driven by the plaintiff's intestate was frightened and made to run away, throwing the plaintiff's intestate from his seat in the carriage and causing the injuries that resulted in his death; the first count of the declaration being for suffering of the plaintiff's intestate and the expense he was put to for medical treatment and medicines, and the second count being for negligently injuring the plaintiff's intestate on September 21, 1911, so seriously that he died as the result of his injuries on May 5, 1912. Writ dated August 27, 1912.

In the Superior Court the case was tried before *Sisk, J.* It appeared that Dr. Pierce, mentioned in the opinion, who died before the trial, was the family physician of the plaintiff's intestate and had treated him for rheumatism and asthma before the accident; that about a week or ten days after the accident Dr. Pierce was called to treat the intestate and continued to treat him professionally until April 2, 1912, calling upon him from seventy-five to one hundred times.

Dr. Clark, who was called as a witness by the plaintiff, had examined the plaintiff's intestate on March 2, 1912, in consultation with Dr. Pierce. The bill of exceptions stated: "Dr. Clark testified that he obtained the history of the case and of the accident from Mr. Little [the plaintiff's intestate] and from Dr. Pierce; that it was his opinion that Mr. Little was, and for a long time prior to the accident had been, suffering from hardening of the arteries; and that Dr. Pierce agreed with that opinion."

The plaintiff, who was the widow of the intestate, testified "that before the accident her husband was a hardworking, active man and carried on a farm in West Newbury; that from the day

of the accident to the day of his death he did no work; was confined most of the time to the house and much of the time to his bed; suffered a great deal of pain in his back and side; found it difficult to sleep; had much difficulty in getting about the house and grew steadily worse until he died."

After testifying that Dr. Pierce was dead, she was asked the question, "While Dr. Pierce was treating Mr. Little, did Dr. Pierce tell you what was the cause of his condition?"

The defendant objected to the question, and the judge ruled that it was competent and permitted it to be answered, subject to the defendant's exception. The question then was repeated in the following form: "What did Dr. Pierce say was the cause of his condition?" The plaintiff answered, "He said the accident, being thrown out of the carriage." No question was raised but that the declaration was made by Dr. Pierce in good faith before the commencement of the action.

The jury returned a verdict for the plaintiff, assessing damages on the first count in the sum of \$1,670 and on the second count in the sum of \$3,500.

R. L. c. 175, § 66, is as follows: "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

J. J. Ryan, for the defendant.

E. S. Underwood, for the plaintiff.

DE COURCY, J. Dr. Pierce, who had treated the plaintiff's intestate after the accident, was not living at the time of the trial. Subject to the defendant's exception, the plaintiff was permitted to answer the question, "While Dr. Pierce was treating Mr. Little, did Dr. Pierce tell you what was the cause of his condition?" The purpose was to disclose the opinion expressed by the physician either as to the nature of the ailment from which his patient was suffering or as to the cause which was responsible for that condition.

It may be assumed, as urged by the plaintiff now and at the trial, that if Dr. Pierce were living he would be permitted as attending physician to give certain opinion evidence in connection with the facts coming under his observation, without qualifying as an expert. See *Hastings v. Rider*, 99 Mass. 622. But it does

not necessarily follow that the statement of an opinion expressed by him would be admissible under the statute.

Declarations of deceased persons, in order to be admissible under R. L. c. 175, § 66, must have been made, not only in good faith, but "upon the personal knowledge of the declarant." In general they must be derived from the exercise of the declarant's own senses as distinguished from opinions based upon data observed by him or furnished by others. While it often is difficult to trace the logical or legal distinction between facts and opinions (see Wigmore on Evidence, § 1919), this court, in construing the statute, has recognized that where the declaration admittedly is one of opinion it is not admissible. *Slotofski v. Boston Elevated Railway*, 215 Mass. 318, 321. *Whitcomb v. Whitcomb*, 217 Mass. 558. *Johnson v. Foster*, 221 Mass. 248, 251. *Gray v. Kelley*, 190 Mass. 184. In the present case the facts on which the trial judge admitted the question are undisputed, and the admissibility of the declaration is before us for review on the defendant's exception. *Ames v. New York, New Haven, & Hartford Railroad*, 221 Mass. 304. It seems plain that the question called for a statement of Dr. Pierce's opinion and not for any information within his "personal knowledge," even if it was asked in order to bring out the physician's diagnosis. If it was designed to evoke the answer actually given by the witness, it was open to the further objection that the opinion it called for was not even a medical one, on which the physician presumably could testify if he were living. After the judge had ruled that the question was admissible, it was put to the plaintiff in the form, "What did Dr. Pierce say was the cause of his condition?" and the answer given was, that the cause of the condition of his patient was "the accident, being thrown out of the carriage." It is not contended that Dr. Pierce witnessed the accident, or had any personal knowledge that Mr. Little was thrown from his carriage.

We are unable to say that the error in admitting the declaration did not injuriously affect the substantial rights of the defendant. The main issue under the second count was whether the accident was the cause of the death of the plaintiff's intestate. There was evidence that for a long time before this occurred he had been suffering from hardening of the arteries, which might have resulted in his death even if the accident had not happened. The state-

ment of the attending physician, to the effect that the cause of Mr. Little's dying condition was not the hardening of his arteries but the fall from his carriage, may have had a controlling influence on the verdict of the jury.

It follows that the entry must be

Exceptions sustained.

LOUIS A. PATRICK vs. OMER DEZIEL.

Middlesex. March 13, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Trespasser, Contributory, In use of automobile, In use of highway, Of child playing on highway, Violation of municipal ordinance. *Trespass*. *Child*. *Evidence*, Presumptions and burden of proof, Violation of ordinance as evidence of negligence.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way.

At the trial of an action against the owner and driver of an automobile by a boy who, after the enactment of St. 1914, c. 553, when twelve years of age and while playing at rolling a hoop on a public way in a city, was run into from behind by the automobile, there was evidence tending to show that the plaintiff, in rolling his hoop, started across the way in a diagonal direction, first looking backward and seeing no automobile approaching and hearing no horn sounded, that the way was seventy-two feet wide with a single track of a street railway in the middle, that when the plaintiff was in the middle of the way the automobile was about sixty feet behind him, that the defendant in his automobile came behind the boy close to the right hand curbstone, that there were no other vehicles upon the street to interfere with or to prevent the defendant from avoiding a collision, and that the plaintiff was run into from behind when he was in the gutter on his and the defendant's right hand side of the way. The defendant's evidence tended to show that, when the automobile was going slowly, the plaintiff ran in front of it. *Held*, that it could not be ruled as a matter of law that the defendant had overcome the presumption of due care of the plaintiff raised by St. 1914, c. 553, and that the questions, whether the plaintiff was guilty of contributory negligence, and whether the accident was caused by negligence of the defendant, were for the jury.

Whether the conduct of the plaintiff interfered "with the convenient and free use of" the highway "by persons travelling or passing along" it, so that it was a violation of an ordinance of the city, providing that "No person shall, within the limits of any public street or highway in the city, play at any game of ball,

snow-ball, foot-ball, or any other game, amusement, or exercise, interfering with the convenient and free use of such street or highway by persons travelling or passing along the same," was *held* to be a question for the jury, so that it could not be ruled as a matter of law that the only duty owed to the plaintiff by the defendant was to refrain from wanton or reckless misconduct.

TORT for personal injuries suffered on June 28, 1915, when the plaintiff, a boy twelve years of age, was run into from behind, as he was rolling a hoop in Mammoth Road in Lowell, by an automobile owned and driven by the defendant. Writ dated July 17, 1915.

In the Superior Court the case was tried before *Keating, J.* The substance of the plaintiff's testimony and of some of the testimony of occupants of the defendant's automobile is described in the opinion.

One George Stewart, a witness called by the defendant, testified in substance that he had been a teamster for fifteen years, that he was driving on Mammoth Road toward the plaintiff and the defendant, both of whom were approaching him; that when he first saw the automobile the plaintiff and his hoop were about twenty yards or more ahead of it and were about half way across the street car track; that the automobile was "blowing away" and was close to the curbstone on its right side of the road; that the plaintiff came across the street "in a slant," the hoop going faster than the automobile, and that there was nothing to interrupt the view of the man driving the automobile.

Other evidence is described in the opinion.

At the close of the evidence, the defendant asked for the following rulings:

- "1. The plaintiff cannot recover.
- "2. There is no evidence of the defendant's negligence.
- "3. The plaintiff was not in the exercise of due care.
- "4. The plaintiff was guilty of contributory negligence."
- "7. The defendant is not liable for any acts which do not amount to wilful and wanton recklessness toward the plaintiff.
- "8. To establish the decree of negligence on the part of the defendant necessary for the plaintiff to recover, the plaintiff must show intentional, wilful wrong.
- "9. The evidence does not show wilful and wanton disregard of the plaintiff's rights by the defendant."
- "13. In order to recover the plaintiff must show intentional

conduct of the defendant having a tendency to injure others, which is known or ought to be known to the defendant accompanied by wanton and reckless disregard of its probable harmful consequences."

The rulings were refused. There was a verdict for the plaintiff in the sum of \$550; and the defendant alleged exceptions.

H. V. Charbonneau, for the defendant.

J. C. Reilly, for the plaintiff.

CROSBY, J. The plaintiff, a boy twelve years old, was struck on June 28, 1915, by an automobile operated by the defendant upon a public highway in Lowell, and received the injuries for which this action is brought.

The highway is seventy-two feet wide between the curbstones and runs in a northerly and southerly direction; and in the centre there is a single street railway track. The accident happened at about half past four o'clock in the afternoon.

The plaintiff, who was rolling a large iron hoop along the sidewalk on the easterly side of the street, crossed the street diagonally in a southerly direction, and while in the gutter on the westerly side of the street was struck by the automobile.

The evidence as to the circumstances of the accident was conflicting. The defendant testified and offered evidence to show that, while he was operating his machine at a rate of six miles an hour, the plaintiff suddenly ran in front of, and only about two feet from the machine and was struck before the defendant could stop his car. If the jury believed this evidence, it is plain there could be no recovery. Apparently the jury did not credit this description of the accident.

The plaintiff offered evidence to show that he was rolling his hoop on the extreme right hand or westerly side of the street, near the gutter; that he did not see the automobile which was going in the same direction; that he was struck from behind; and that there were no other vehicles upon the street to interfere with or prevent the defendant avoiding a collision.

1. The plaintiff testified that he crossed the track to get on the right side of the road, and "looked back and front and there was nothing coming, that he did not see the automobile when he looked back." When asked "Whether or not you heard any horn sounded?" he answered, "No, sir."

The plaintiff was not a trespasser upon the highway because he was rolling a hoop, and the defendant had no right to run over him. *O'Brien v. Hudner*, 182 Mass. 381. *Slattery v. Lawrence Ice Co.* 190 Mass. 79. Under St. 1914, c. 553, which applies to this case, the plaintiff is presumed to have been in the exercise of due care, and contributory negligence on his part is an affirmative defence to be set up in the answer and proved by the defendant.

In view of the width of the street, the fact that the accident occurred upon the extreme right side of the way, and the precautions which the plaintiff testified he took to avoid injury, we do not think it could be ruled that the defendant had overcome the presumption created by the statute, or proved affirmatively that the plaintiff's conduct contributed to his injury, but that these questions were matters of fact for the jury to decide. *O'Brien v. Hudner*, *supra*. *Beale v. Old Colony Street Railway*, 196 Mass. 119. *Dowd v. Tighe*, 209 Mass. 464.

2. The defendant introduced in evidence the following ordinance of the city of Lowell:

"No person shall, within the limits of any public street or highway in the city, play at any game of ball, snow-ball, foot-ball, or any other game, amusement, or exercise, interfering with the convenient and free use of such street or highway by persons travelling or passing along the same."

The defendant contends that the plaintiff at the time he was hurt was acting in violation of this ordinance, and that such violation was the cause of his injury; and therefore that the defendant is not liable unless the plaintiff prove the acts of the defendant amounted to gross and wilful negligence. We are unable to agree with this contention. It is to be noted that the ordinance does not absolutely prohibit games or amusements in the highway, but only such as interfere "with the convenient and free use of such street or highway by persons travelling or passing along the same." Whether the plaintiff was acting in violation of the ordinance was a question of fact for the jury to determine under proper instructions. As the charge of the judge is not reported, and as no exceptions were taken thereto, we must assume that full and accurate instructions were given.

3. The defendant owed to the plaintiff the duty of reasonable care; and, without reciting the evidence, we are of opinion that

it could have been found that the defendant could have avoided the collision by the exercise of such care.

The defendant's requests for rulings could not properly have been granted. The case was rightly submitted to the jury, and as we perceive no error in the conduct of the trial, the entry must be

Exceptions overruled.

JANE SOUDEN, administratrix, vs. FORE RIVER SHIP BUILDING COMPANY.

Norfolk. March 15, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Employer's liability, On a steamship, *Res ipsa loquitur*. *Ship*. *Death*. *Conflict of Laws*. *Jurisdiction*. *Evidence*, Presumptions and burden of proof, Matter of conjecture.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. In this action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube, after a review of the evidence it was *held*, that there was evidence upon which findings were warranted, either that the explosion was due to a defective condition of pumps which fed water to the boiler, or to improper action of apparatus which fed oil as fuel, or to both causes, and that such defective condition was known or in the exercise of reasonable care should have been known to those in control of the ship for the employer, that therefore the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury.

At such trial, the fact that the explosion occurred while the boiler was being subjected to the use for which it was designed was *held* to be in itself evidence of a defective condition.

It also was *held*, that, while the plaintiff was bound to offer evidence to show that the explosion was caused by negligence of the defendant, he was not required to point out the particular act or omission which caused the accident.

It also was *held* that proper inspection of the boiler tubes was, in the present case, a duty of the defendant which could not be delegated, so that, if the performance of that duty was left by the defendant to a fellow servant of the plaintiff's intestate who was negligent and whose negligence caused the death, the defendant would be liable.

It also was *held*, that, upon the evidence in the present case, the question, whether there had been negligence in the performance of the duty of inspection, was for the jury.

CROSBY, J. This is an action of tort, brought to recover for the conscious suffering and death of the plaintiff's intestate, who, while in the defendant's employ on November 5, 1909, received an injury which resulted in his death on the following day.

The declaration contains seven counts. The first, fifth and sixth are based upon the common law, and the second, third, fourth and seventh are under the employers' liability act. The third count is to recover for the death of the plaintiff's intestate, and alleges a defect in the condition of the ways, works or machinery of the defendant, in conformity with the employers' liability act. It is agreed that a sufficient notice under the act was served by the plaintiff upon the defendant. The presiding judge of the Superior Court * ruled that the plaintiff could not recover and ordered a verdict for the defendant and reported the case to this court, the parties stipulating that, "If that ruling is right, the judgment for the defendant stands. If it is wrong, it is agreed that judgment for \$4,000 be entered for the plaintiff."

The accident which resulted in the death of the intestate occurred on board the battleship North Dakota on her trial trip, while she was engaged in a speed test from Rockland, Maine, in the direction of Provincetown upon the high seas after she had reached the waters of Massachusetts Bay. The defendant is a Massachusetts corporation, and at the time of the accident the battleship was in its charge and control. The plaintiff's intestate was employed as a coal passer on the ship, and was working in that capacity at the time of the accident.

1. It is settled that in case of a death occurring upon the high seas, an action may be maintained to enforce a remedy given by the State where the vessel is owned, — and as the intestate was killed while on the high seas in a vessel belonging to a Massachusetts corporation, it was within the territorial jurisdiction of Massachusetts, and the rights of the parties are to be determined by the common law and the statutes of this Commonwealth. *The Hamilton*, 207 U. S. 398. *La Bourgogne*, 210 U. S. 95.

2. Upon the evidence the jury would have been warranted in finding that the plaintiff's intestate was in the exercise of due care. He was seventeen years of age and apparently his only work con-

* *Brown, J.*

sisted in carrying and shovelling coal. We do not understand that the defendant contends that he was lacking in due care.

3. The accident was due to an explosion of a tube or tubes in one of the boilers of the ship in the fire room where the intestate was working, by reason of which he was burned and scalded and died from his injuries the following day. There is no evidence to show that he knew or could have known of the condition of the tubes or appreciated the risk of an explosion, and therefore it could not have been ruled that he assumed the risk. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155. *Ruddy v. George F. Blake Manuf. Co.* 205 Mass. 172. There was no evidence to show that the defective conditions existed before he entered upon his employment, and so there was not a contractual assumption of the risk; and as to defects which arose afterwards, it could not have been ruled that he assumed them; besides it is to be noted, that the defence that the intestate assumed the risk, has not been pleaded. *Leary v. William G. Webber Co.* 210 Mass. 68.

4. The question left for determination is whether there was any evidence from which it could have been found that the defendant was negligent. The battleship North Dakota had been constructed by the defendant for the government of the United States, and was engaged in a trial trip at the time of the explosion. There was evidence that the ship had been in or near Rockland Harbor for several days before the accident, and on that morning had made some runs before her speed test trip began. She was provided with four main feed pumps and four auxiliary feed pumps for supplying water to the boilers. There was evidence to show that some of the main feed pumps were in a defective condition on the day of the accident and also on the day before it occurred, and that they did not furnish sufficient water for the boilers; that one or two of them broke down before the trial trip began; "that within two hours previous to the accident the main feed pumps, upon which the supply of water to the boilers depends, were very erratic in their action; that at several times during this period two of them were not functioning, that the action of the pumps was so erratic and unreliable that they were reported against; that two of the main feed pumps could not possibly furnish the water for a full speed trial, because they had not the capacity; that two pumps broke down during the speed trial."

It could have been found that the defendant's officers and agents in control of the ship knew, or in the exercise of reasonable care would have known of the defective condition of the pumps. There was also evidence that about twenty minutes after the explosion the boiler gauge glasses in the fire room where the explosion occurred did not show any water in three of the boilers; that if the pumps failed to supply an adequate amount of water to the boiler tubes, it would cause the tubes to burn and blow out. This evidence, if believed, would justify the jury in finding that the explosion was due to a defective condition of the pumps, and was wholly independent of any negligence of the water tender, who was a fellow servant of the intestate, in failing to keep a sufficient supply of water in the boilers.

It appeared in evidence that the ship was equipped with an oil fuel system, by means of which oil was sprayed in the form of a cone into the furnace, for the purpose of intensifying the heat made by coal fires under the boilers; that the boiler tube which exploded was directly in line with the oil sprayer; that the place where this tube burst was subject to an undue and excessive heat and that such heat might cause the tube to burst. There was also evidence to show that the fuel oil system was not completed at the time the ship left for her trial trip, and that the system had not been properly tested before being put into actual operation. There was expert testimony to the effect that the explosion was due either "to low water in the boiler or to the action of the oil fuel in not spraying properly from the nozzle and impinging at that particular point on the tube, causing overheating, bulging and rupture."

In view of this evidence, the cause of the explosion is not left to conjecture as the defendant contends. The jury would have been justified in finding that it was the result of one or both of the causes before referred to. If so, there was evidence of negligence.

The fact that the explosion occurred while the boiler was subject to the use for which it was designed is of itself evidence of a defective condition. *Cleary v. Cavanaugh*, 219 Mass. 281. *Sullivan v. Reed Foundry Co.* 207 Mass. 280. *Minihan v. Boston Elevated Railway*, 197 Mass. 367. While the plaintiff was bound to offer evidence to show that the explosion was caused by the defendant's negligence, he was not required to point out the partic-

ular act or omission which caused the accident. *Ryan v. Fall River Iron Works*, 200 Mass. 188. *Byrne v. Boston Woven Hose & Rubber Co.* 191 Mass. 40. *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196, 202.

There was evidence to show that no inspection of the boiler tubes had been made either on the day of the accident or on the preceding day, although it could have been found that such inspection should have been made and, if made, would have readily disclosed the defective and dangerous condition of the tubes. We are of opinion that the jury could have found that such failure to inspect amounted to negligence on the part of the defendant. If the duty of inspection rested upon those who were fellow servants of the plaintiff's intestate and they failed to perform that duty, still the defendant is responsible because proper inspection is an obligation which cannot be delegated to a servant so as wholly to excuse the master. *Moynihan v. Hills Co.* 146 Mass. 586. *Erickson v. American Steel & Wire Co.* 193 Mass. 119. *White v. Newborg*, 208 Mass. 279.

In view of what has been said, it is unnecessary to consider all the issues raised by the report.

We are of opinion that it could not properly have been ruled that there was no evidence to warrant a finding that the defendant was negligent, but that this question was for the jury to determine as a matter of fact.

In accordance with the terms of the report, let the entry be

Judgment for the plaintiff for \$4,000.

P. R. Blackmur & R. Spring, for the plaintiff.

J. Lowell, (*J. A. Lowell* with him,) for the defendant.

ELIZABETH LANE vs. GEORGE W. RAYNES.

Suffolk. March 17, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Landlord and Tenant. Negligence, Of one controlling real estate.

Where the owner of a house let to a single tenant at will has agreed to make general repairs during the tenancy, and fails to keep his agreement, this does not make him liable in tort to the tenant for personal injuries sustained by the tenant by reason of the giving way of rotten steps that the owner had failed to repair after being told that they were "shaky" when apparently they were in good condition.

TORT for personal injuries caused by the falling of the outside back stairs of a house of which the defendant was the landlord and the plaintiff was the tenant. Writ dated January 5, 1914.

In the Superior Court the case was tried before *Stevens, J.* The material evidence is described in the opinion.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

A. G. Sleeper, for the plaintiff.

R. H. Willard & W. H. Taylor, for the defendant.

DE COURCY, J. The plaintiff was tenant at will of the entire dwelling house and, in the absence of a special stipulation, the landlord would owe her no duty to keep the steps in a safe condition. Her contention is that there was evidence from which the jury could find either that the landlord agreed to make such repairs as might be needed during the tenancy, or to maintain the premises in a safe condition for the tenant. The further suggestion that the steps were in the nature of a trap, to the knowledge of the defendant, finds no support in the evidence. *Shute v. Bills*, 191 Mass. 433. *Walsh v. Schmidt*, 206 Mass. 405.

There is but meagre evidence bearing on the alleged agreement. The plaintiff was asked: "What conversation did you have with Mr. Brown, the defendant's agent, regarding repairs of the building?" and her reply was, "Mr. Brown told me that he would keep

the building in good repair, he would send a man up and have the building kept in good repair which he done up to that time." As she later expressed it, "Mr. Brown told me that he would send a man and have the house repaired, which he done that." A man accordingly was sent, who fixed the windows and the back gate; and the plaintiff, being satisfied with the condition of the building, moved in. She testified that about a week before the accident she talked with a man in Mr. Brown's office about the steps "being shaky," although apparently they were in good condition. At the time of the accident it could be found that the steps "broke away from the house," and that the wood was "all rotten." No repairs had been made upon them by the defendant.

It seems to us that the construction given to the alleged agreement by the presiding judge was as favorable as the plaintiff was entitled to, namely, that it was an agreement to make general repairs during the tenancy. And, as the action is in tort for actual negligence, it is not enough to show that the defendant failed to comply with his agreement to make repairs, even after notice. *Tuttle v. Gilbert Manuf. Co.* 145 Mass. 169. *Miles v. Janvrin*, 196 Mass. 431. She must go further and show that the landlord actually made the repairs, and was negligent in making them, thus causing her injury. *Galvin v. Beals*, 187 Mass. 250, and cases cited.

In our opinion the evidence does not support the second contention, namely, that the landlord agreed to maintain the premises in a safe condition, retaining such control as was necessary for that purpose. This does not appear to be a case where "the landlord undertakes and assumes the duty of looking after the condition of the premises in reference to safety, and of doing what is necessary for that purpose, so that the tenant properly may trust him for the performance of this duty." *Miles v. Janvrin*, 200 Mass. 514, 516. *Flanagan v. Welch*, 220 Mass. 186.

Exceptions overruled.

JOSEPH J. DINAN & others vs. SIMON SWIG.

Suffolk. March 20, 1916. — April 6, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Constitutional Law. Elections. Legislature. House of Representatives. Corrupt Practices.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is contrary to c. 1, § 3, art. 10, of the Constitution, which provides that "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members," and also to art. 30 of the Declaration of Rights, which declares the separation of the legislative and judicial departments of the government.

RUGG, C. J. This is a petition brought under St. 1913, c. 835, § 369, as amended by St. 1914, c. 783, § 10, which relates to corrupt practices in elections, against the respondent, who was elected a member of the General Court of the Commonwealth for 1916. Summarily stated, the statute, so far as here material, requires that, upon petition of five or more voters having reasonable cause to believe that there has been committed by a successful candidate, (for whom they had a right to vote,) in connection with his election or in his interest and behalf a corrupt practice as defined in the act, three judges of the Superior Court shall investigate the election. If after a hearing it is found that such corrupt practice has been committed, then the court is given power to enter a decree, § 10 (g), "declaring void the election of the defendant to the office in question, and ousting and excluding him from such office and declaring the office vacant: providing, however, that if an election petition is brought to investigate the election of a member of the Senate or House of Representatives of the Commonwealth, or of the United States Congress, and the court or a majority of them shall find that violations of this act have been committed with reference to such election, of such a nature that a decree would otherwise be entered declaring void the election or ousting or excluding the candidate from such office and declaring

the office vacant, the court shall, subject to the limitations and conditions hereinbefore prescribed, enter a decree declaring that with respect to the election of the said candidate a corrupt practice was committed and setting forth the facts relative to such finding, and shall forthwith certify the decree and declaration to the Secretary of the Commonwealth, to be by him transmitted to the presiding officer of the legislative body to which the defendant was elected."

Proceedings have been had in accordance with the terms of this statute and a finding with appropriate details has been made that the respondent, elected a member of the House of Representatives of the Commonwealth, committed corrupt practices in connection with his election. The three judges * then reported to this court among other matters the question whether the statute is constitutional so far as it imposes duties upon the court with reference to the election of a member of the Legislature.

The pertinent provision of the Constitution is in c. 1, § 3, art. 10: "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the Constitution. . . ."

The power to pass upon the election and qualification of its own members thus is vested exclusively in each branch of the General Court. No other department of the government has any authority under the Constitution to adjudicate upon that subject. The grant of power is comprehensive, full and complete. It is necessarily exclusive, for the Constitution contains no words permitting either branch of the Legislature to delegate or share that power. It must remain where the sovereign authority of the State has placed it. General phrases elsewhere in the Constitution, which in the absence of an explicit imposition of power and duty would permit the enactment of laws to govern the subject, cannot narrow or impair the positive declaration of the people's will that this power is vested solely in the Senate and House respectively. It is a prerogative belonging to each house, which each alone can exercise. It is not susceptible of being deputed. As was said by Chief Justice Gray in *Peabody v. School Committee of Boston*, 115 Mass. 383, at page 384: "It cannot be doubted that either branch of the Legislature is thus made the final and exclu-

* *Fox, Jenney, & McLaughlin, JJ.*

sive judge of all questions whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof."

If the statute should be construed as conferring upon the three judges of the Superior Court final jurisdiction to pass upon the issue whether a successful candidate had been guilty of corrupt practices, it would be in derogation of the express grant of the Constitution because it would deprive each branch of the Legislature of the unlimited right to be "the judge of the . . . elections, and qualifications of its own members." No legislative body can be the sole judge of the election and qualifications of its members when it is obliged to accept as final a decision touching the purity of the election of one of its members made by another department of the government in an inquiry to which that legislative body is not a party and which it has not caused to be instituted.

The proceeding created by the instant statute does not emanate from either branch of the Legislature. It is set in motion only by the initiative of five or more voters. It may result in sending to the legislative branch, to which the defendant has been elected, a decree setting forth the determination of the judges that a corrupt practice has been committed. That decree may be ignored by the branch of the Legislature to which it is sent. There is no legal compulsion resting upon that branch to take action respecting such decree. Only its sense of self respect and duty to the whole Commonwealth to purge itself of a member unworthy of his office would impel it to pay heed to the decree. If action should be taken, it still would be open for that branch of the Legislature to exercise its constitutional prerogative and to examine the whole issue for itself and to decide whether the election and qualification of the member were such that he ought to be expelled and the election declared void. That decision, when made by the branch of the legislature concerned, would stand as final and could not be disputed or revised by any court or authority. *Coffin v. Coffin*, 4 Mass. 1, 34-36. *Opinion of the Justices*, 10 Gray, 613, 623. *Hiss v. Bartlett*, 3 Gray, 468, 472, 475. Such decision would nullify the efficacy of the finding of the facts set forth in the decree of the three judges of the Superior Court.

The Constitution confers upon each branch of the Legislature by necessary implication the power to determine for itself the procedure as to settlement of controversies touching the election and qualification of its own members, and the ascertainment of all facts relative thereto, and to change the same at will. That established by one branch might differ from that adopted by the other. But the statute, so long as it stands, imposes upon both branches uniformity of procedure so far as concerns this particular matter. One branch cannot ignore it without a repeal of the statute. A repeal can be accomplished only by affirmative vote of both branches and approval by the governor. Yet the Constitution plainly gives to each branch of each successive Legislature an untrammelled power to proceed in its own manner and according to its own judgment without seeking the concurrence or approval of the other branch, or of the executive. This discretion to determine the method of procedure cannot under the Constitution be abrogated by action taken by an earlier Legislature.

The only way open to either branch of the Legislature under the Constitution to obtain the assistance of the judicial department of government in the performance of the duties reposed in it by the Constitution is under c. 3, art 2. That goes no further than to enable either branch to secure the advice of the justices of the Supreme Judicial Court "upon important questions of law, and upon solemn occasions." It does not extend to the determination of questions of fact. It does not authorize the imposition upon the courts of functions vested by the Constitution exclusively in other departments of government. *Case of Supervisors of Election*, 114 Mass. 247. *Boston v. Chelsea*, 212 Mass. 127.

The statute cannot be supported by c. 1, § 3, art. 11, of the Constitution. The final paragraph of that article is: "And the Senate and House of Representatives may try and determine all cases where their rights and privileges are concerned, and which, by the Constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may respectively think best." It is still "the Senate and House of Representatives" which must hold the trial and make the decision. The Senate or House of Representatives of any particular Legislature to which the question may be presented has the power to decide whether to try such cases by "committees of their own mem-

bers, or in such other way as they may respectively think best." This grant of absolute power cannot be fettered by the opinion of both branches of some preceding Legislature expressed in a statute. Each branch of the Legislature may try and determine the question as to violation of the corrupt practices act by a committee of its own members or doubtless by a committee otherwise constituted. But it cannot require the judiciary as a co-ordinate department of government to hold a trial and render a decision which in its nature must be purely tentative or advisory and wholly subject to its own review, revision, retrial or inaction. This would be imposing upon the judicial department of the government the investigation of a matter not resulting in a judgment, not finally fixing the rights of parties and not ultimately determining a state of facts. It would subject a proceeding arising in a court to modification, suspension, annulment or affirmation by a part of the legislative department of government before it would possess any definitive force. Manifestly this is in contravention of art. 30 of the Declaration of Rights which marks the entire separation of the legislative and judicial departments of the government. *Denny v. Mattoon*, 2 Allen, 361, 379. *Opinion of the Justices*, 201 Mass. 609, 612.

The statute cannot be upheld upon the ground which supports the appointment of commissioners to perform duties lying close to the line between the legislative and judicial faculties, but partaking chiefly of the latter nature, illustrated by *Boston, petitioner*, 221 Mass. 468, 474, and cases there collected, *Northampton Bridge Case*, 116 Mass. 442, *Brayton v. Fall River*, 124 Mass. 95, *County Commissioners, petitioners*, 140 Mass. 181, *In re Metropolitan Park Commissioners, petitioners*, 209 Mass. 381, and similar cases. In all those cases the Legislature reserves no power of revision, but the whole matter proceeds to a final judgment in the courts.

For these reasons we are constrained to hold that so much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of simple inquiry into corrupt practices in connection with the election of members of the General Court is contrary to the terms of the Constitution. No opinion is intimated as to the validity of other parts of the act. It is unnecessary to consider the other questions reported.

It follows that the first question,* so far as relates to the proceeding at bar, must be answered in the negative.

So ordered.

The case was argued at the bar in March, 1916, before *Rugg, C. J., Braley, De Courcy, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

J. P. Walsh, (G. F. Grimes with him,) for the petitioners.

H. Parker, for the respondent.

ANTONIO CUOZZO vs. CLYDE STEAMSHIP COMPANY.

Suffolk. November 9, 1915. — April 8, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability, Assumption of risk. Pleading, Civil, Answer.

At the trial of an action by an employee against his employer for personal injuries caused by the breaking of a movable skid over which it was the plaintiff's duty to haul a loaded hand truck, it appeared that the plaintiff had been employed by the defendant at the same work for two or three years, the work during that period being carried on in the same manner as at the time of the accident, that the skid had been decayed and old, and rotten from water, during all that time, and that the plaintiff had known of this condition. *Held*, that the evidence showed a contractual assumption by the plaintiff of the risk of injury from the breaking of the skid, and that therefore he could not recover.

It also was *held* that, under the circumstances above stated, the question of the liability of the defendant would not be affected by the fact that a superintendent of the defendant was negligent in selecting and placing the skid for use by the plaintiff.

A portable skid, adapted for use in difficult places and in use by a steamship corporation between a street and the end of a permanent platform over which from a steamship longshoremen employed by the corporation wheel loaded hand trucks, is not a part of the ways, works or machinery of the corporation.

In an action of tort by an employee against his employer for personal injuries, the defence that there was a contractual assumption of the risk of the injury may be relied on without being set up affirmatively in the answer.

* The first question reported by the three judges was as follows: "1. Is St. 1914, c. 783, as far as it imposes duties upon this [the Superior] court with reference to a member of the Legislature, valid?"

TORT for personal injuries received by the plaintiff while in the employ of the defendant as stated in the opinion. Writ dated November 9, 1909.

In the Superior Court the case was tried before *Pratt, J.* At the close of the evidence, material portions of which are described in the opinion, and subject to an exception by the plaintiff, the judge ordered a verdict for the defendant.

After the death of *Pratt, J.*, the case was reported by *Wait, J.*, to this court for determination, it being agreed that, if upon the evidence the case should have been submitted to the jury, the verdict was to be set aside and the case was to be submitted to the jury upon the question of damages only, the liability of the defendant to be taken as admitted.

The case was submitted on briefs at the sitting of the court in November, 1915, and afterwards was submitted on briefs to all the justices.

J. W. Pickering & J. Vecchioni, for the plaintiff.

S. R. Jones, for the defendant.

CROSBY, J. The plaintiff, a longshoreman in the employ of the defendant, on August 26, 1909, was unloading barrels containing resin from a steamship over a fixed permanent platform and across a movable skid or toe piece to the street. Several men were engaged in the work, and the barrels were unloaded by means of ordinary two-wheeled trucks. The men worked from two to five or ten feet apart. The skid extended from the platform to the street. It was about six feet wide and about three feet long, and was constructed from two-inch planks.

Just before the accident, one DiMambro, a fellow workman, preceded the plaintiff over the platform. As his (DiMambro's) truck passed over the skid, the barrel upon the truck tipped off; and the plaintiff, who was about ten feet behind DiMambro, upon the permanent platform, saw what had happened. The plaintiff then started to haul his truck across the skid when one of the planks broke and the right wheel of the truck went through it. The plaintiff's left foot also went through the planking as he was trying to extricate the truck, and the barrel and truck fell upon him, causing the injuries which he sustained.

The case comes to this court upon a report made by a judge of the Superior Court. It appears from the report that the plain-

tiff had been employed in the same kind of work for the defendant four or five days a week for a period of two or three years before the accident; that "the work was always carried on in the same manner as at the time of the accident and was always over the same permanent platform and the same movable skid or toe piece at the end of the platform." At the time of the accident the skid was decayed and old, and also rotten from water. The plaintiff testified that "he had known of this condition all the time that he had worked there and saw that this skid was there and at the same place;" that "there was no difference in the appearance of the skid that morning from what it had appeared before. It always looked the same as it did on the morning of his accident. In looking at DiMambro he saw that the plank was decayed and rotten, and that caused DiMambro's barrel to fall off, and he knew that was why DiMambro's barrel fell off." The plaintiff introduced other evidence to show that the skid had been there for a long time and that it "looked bad, looked all rotted out."

This case is governed by principles of law that are well settled. The plaintiff, by his contract of employment, assumed all the obvious risks of the business in which he was engaged. While it is the duty of an employer to furnish his employee with reasonably safe tools and appliances and to furnish him with a reasonably safe place in which to perform his work, still if the tools and appliances so furnished are defective and unsuitable, or the place where he is put to work is dangerous, and he fully appreciates and understands such defects and dangers, and is injured, he is held to have assumed such risks and cannot recover. *O'Toole v. Pruyn*, 201 Mass. 126, and cases cited.

The undisputed facts show that the defective condition of the skid was apparent to any one of ordinary intelligence who observed it, and that the plaintiff knew it was decayed, old, and rotten from water. He knew also that it had been in this condition during all the time that he had worked there. He testified that he had knowledge of all these facts. Under these circumstances it is plain that he not only knew of the defective condition of the skid, but that he fully realized and appreciated whatever danger existed in passing over it. *Noonan v. Foley*, 217 Mass. 566. *Neagle v. New York, New Haven, & Hartford Railroad*, 214 Mass. 472. *Regan v. Lombard*, 192 Mass. 319.

It is admitted that one Meltzer was a superintendent within the provisions of the employers' liability act, and there was evidence that he had charge of the selecting and placing of the skids and that it was his duty to see that they were kept in proper condition; still if, as such superintendent, he failed to perform his duty in this particular, it cannot enlarge the defendant's liability to the plaintiff. As the defendant was not liable to the plaintiff for its failure to maintain the skid in proper repair, so the failure of its superintendent in this regard does not render the defendant liable to the plaintiff. The principle which prevents an employee from recovering for an injury which arises from an obvious risk of the business growing out of the nature of the employment applies as well to actions brought under the employers' liability act as to those at common law. *Goodes v. Boston & Albany Railroad*, 162 Mass. 287.

The skid was not a part of the ways, works or machinery of the defendant. It was a portable appliance adapted for use in different places as required. *Neagle v. New York, New Haven, & Hartford Railroad*, 214 Mass. 472.

Where it appears that, in an action brought by an employee against his employer, the former voluntarily assumed the risk which did not arise from his contract of employment, this is an affirmative defence and must be specially pleaded. But where, as in this case, there was a contractual assumption of risk, it is not a matter of defence and need not be so pleaded. In such a case there is no failure of duty on the part of the employer, and therefore there is no negligence. *Ashton v. Boston & Maine Railroad*, 222 Mass. 65.

As it is plain that there was no evidence to justify a finding that the defendant was negligent, the question whether the evidence would have justified a finding that the plaintiff was in the exercise of due care need not be considered.

In the opinion of a majority of the court the ruling of the judge of the Superior Court was right; and in accordance with the terms of the report the entry must be

Judgment for the defendant on the verdict.

ANNIE E. STEWART vs. HUGH NAWN CONTRACTING COMPANY.
SAME vs. CITY OF BOSTON.

Suffolk. November 17, 1915. — April 8, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Way, Public: defect. Negligence, Of contractor working in highway. Boston Transit Commission. Public Officer. Evidence, Competency.

At the trial of an action of tort for personal injuries against the city of Boston under R. L. c. 51, § 18, there was evidence warranting findings that, when the plaintiff was crossing Boylston Street from her place of employment to mail a letter, she stepped upon a plank which was a part of the surface of the street and which a contractor, working under the Boston Transit Commission in the construction of the subway by authority of St. 1911, c. 741, had substituted for the pavement, that the plank gave way under the plaintiff's foot, twisted her ankle and caused her to fall, that the plank, although it should have been nailed at the end, was loose and, when stepped upon, moved in different directions, that it had been loose about ten days before the accident and had continued so to the time of the accident, and that the street had been open for travel for several days before the accident. *Held*, that the question, whether the defendant knew or in the exercise of reasonable care should have known of the defective condition of the street, was for the jury.

It also was *held* that the city was not released from liability merely because the work was being done by a contractor employed by the Boston Transit Commission.

On the same evidence, it also was *held* that, in an action by the same plaintiff against the contractor, the question, whether the plaintiff's injury was caused by the defendant's negligence, was for the jury.

The fact that, if the Boston Transit Commission itself had done the work above described, the city of Boston would not have been liable for its negligence because the commissioners were public officers, was *held* not to free the contractor from liability.

In St. 1911, c. 741, relating to the construction by the Boston Transit Commission of certain subways and tunnels, the provision in § 18 as to leaving streets "open for traffic" during certain hours when the work is being done is intended to include in the word "traffic" travel upon such streets for any proper purpose by pedestrians and vehicles, and includes a crossing of such a street by an employee in a store facing on it for the purpose of posting a letter in a mail box.

And such an employee, in crossing the street on a plank covering substituted by a contractor employed by the Boston Transit Commission for the pavement, may be found to have been in the exercise of due care.

Where, at the trial of an action of tort for personal injuries caused by a loose plank forming part of the temporary surface of a highway, the plaintiff has described a defective condition which she observed at the time of the accident

and has testified that she observed the plank three weeks after the accident and that the condition was the same then as it was at the time of the accident, another witness, who saw the plank for the first time three weeks after the accident, may describe its condition at that time.

TWO ACTIONS OF TORT for personal injuries alleged to have been suffered by the plaintiff by reason of a loose plank in the covering of the excavation for the construction of the subway under Boylston Street in Boston, alleged to be a defect in that highway caused by negligence of the defendant contracting company. Writs dated December 13, 1913.

In the Superior Court the cases were tried together before *Raymond, J.* The testimony of the plaintiff and of Clarkson as to the planks in question, referred to in the opinion, was in substance as follows: The plaintiff testified that at the time of her injury she observed the board, that it was not nailed down, that it was raised above the level of the other boards and was loose, that it was raised its width over the board next to it and that it moved when she stepped on the end of it. She also testified that, upon her return to her place of employment three weeks after the accident, she observed the board and that it appeared to be the same as at the time of the accident. Clarkson, who had not seen the board at the time of the accident, described its condition as it was three weeks after the accident, when the plaintiff returned to the store where she was employed.

Other material evidence is described in the opinion. In each case there was a verdict for the plaintiff in the sum of \$2,000; and the defendants alleged exceptions.

T. H. Mahony, for the defendants.

F. W. Johnson, for the plaintiff.

CROSBY, J. The plaintiff, while crossing Boylston Street in the city of Boston from the store numbered 332 on that street to the farther side of the street where she intended to post a letter at a mail box located near the corner of Arlington Street, was injured by reason of an alleged defect in the street.

The plaintiff testified that when she was crossing over the outbound street railway track, she stepped upon a plank lying next to the most northerly rail and that the plank "gave way under my foot, and I caught — I twisted my ankle and caught my heel on the edge of the plank as it turned up and lost my balance."

At the time of the accident and for some time previous thereto the defendant company was engaged in the construction of a subway under Boylston Street, and in the course of its work had removed the surface paving and had replaced it with a plank covered structure. This work was being performed by the defendant company under a contract with the transit commission acting under the authority of St. 1911, c. 741. The surface planking was composed of planks sixteen feet long, eight inches wide and four inches thick laid on cross beams and spiked at each end. There was evidence that the plank upon which the plaintiff stepped was raised above the level of the other planking; that it was loose and, when stepped upon, moved in different directions. There also was evidence from which it could have been found that this part of Boylston Street was open for public travel and had been open for such travel for several days. There was further evidence that the plank in question was loose during the last part of September before the accident, which occurred on October 9, 1913, and it could have been inferred that it remained in the same condition from the last part of September up to the time the plaintiff was hurt. In view of this evidence, we are of the opinion a finding was warranted, that the defendant city either knew of the defect in the way, if it was defective, or by the exercise of proper care and diligence might have had reasonable notice of its existence. R. L. c. 51, § 18.

The city was not released from liability because the work was being done by a contractor employed by the transit commission. *Connelly v. Boston*, 206 Mass. 4. *Torphy v. Fall River*, 188 Mass. 310.

We are also of opinion that the question whether the defendant company was negligent was for the jury. An independent contractor is liable for negligence in the conduct of a public work by private contract, *Murray v. Boston*, 219 Mass. 501, although, if the transit commission had performed the work itself, the city of Boston would not be liable to the plaintiff, as the transit commissioners are public officers. *Mahoney v. Boston*, 171 Mass. 427. The jury were warranted in finding that the plank was in an unsafe condition due to the negligence of the defendant company. *Rockwell v. McGovern*, 202 Mass. 6.

We cannot agree with the contention of counsel for the defendants that under St. 1911, c. 741, § 18, the word "traffic" did not

authorize the use of the street by persons except those engaged in commerce. While "traffic" is defined generally as the exchange of goods and commodities and the business of transportation, in this connection it cannot be construed so narrowly as to exclude all other uses of the street. We think that the Legislature intended "traffic" to apply to street traffic in the ordinary sense in which that term is used, and that it includes travel upon the street for any proper purpose by pedestrians and vehicles.

The jury would have been warranted in finding that the plaintiff was in the exercise of due care.

The testimony of the plaintiff and of the witness Clarkson as to their observation of the plank three weeks after the accident was admissible to show its condition at the time of the accident, and was admitted solely for that purpose.

Without considering in detail all the defendant's requests, we are of opinion that they were covered by the instructions to the jury so far as they properly could have been given.

The entry in each case must be

Exceptions overruled.

EDMOND E. FOSTER & another vs. CONNECTICUT RIVER
TRANSMISSION COMPANY.

Worcester. October 5, 1915. — April 11, 1916.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Deed, Construction. Contract, Construction. Easement, Extent of. Trespass.

In an action of contract against a corporation to recover compensation for the damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it appeared that the plaintiff by deed had granted to the defendant "the perpetual right and easement to erect, repair, maintain and patrol a single or double line of poles or towers and wires strung upon the same and from pole to pole and from tower to tower, for the transmission of high or low voltage electric current, with all necessary anchors, guys and braces, to properly support and protect the same, over and across" the land described, and that the deed also contained the following provision: "In further consideration, the second party has paid to the first party the sum of five dollars for each one hundred feet of land crossed by the above mentioned pole or tower line, for a single line of poles or towers; and the party of the second part hereby agrees to pay for any extra poles or towers set on the above described property five dollars

for each one hundred feet of land crossed by the wires strung upon the same." It further appeared that the defendant later erected a pole between each of the two existing towers and one pole beyond the outside tower at each end of the line, that these poles were connected only with telephone wires already existing, that they took the place of weights and bars that previously had supported these wires and that no new wires were strung on the new poles. *Held*, that under the easement and the contract contained in the deed the defendant had no right to erect the new line of poles merely to support existing wires, and therefore that the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort.

CARROLL, J. This is an action of contract to recover for "extra poles" placed on the plaintiffs' land, extending a distance of twenty-six hundred and seventy-eight feet. In 1908 the plaintiffs conveyed to the Connecticut River Power Company the perpetual right and easement to erect a line of poles over their land, the grantee agreeing to pay "five dollars for each one hundred feet of land crossed by the above mentioned pole line."

In January or February, 1909, seven steel towers, each about forty-five feet high, were erected on the plaintiffs' land. In March or April of the same year six "electric cables for high voltage" were strung from these towers. Above these cables, on the top of each tower, was a pole; along these poles was strung a single line of wire called the "lightning wire." Below the cables were two telephone wires, strung from tower to tower, and supported by weights and bars.

After this work was done, on September 3, 1909, the plaintiffs conveyed to the defendant the right previously conveyed to the power company, namely, "the perpetual right and easement to erect, repair, maintain and patrol a single or double line of poles or towers and wires strung upon the same and from pole to pole and from tower to tower, for the transmission of high or low voltage electric current, with all necessary anchors, guys and braces, to properly support and protect the same, over and across" the land described. The deed contained this stipulation: "In further consideration, the second party has paid to the first party the sum of five dollars for each one hundred feet of land crossed by the above mentioned pole or tower line, for a single line of poles or towers; and the party of the second part hereby agrees to pay for any extra poles or towers set on the above described property five

dollars for each one hundred feet of land crossed by the wires strung upon the same."

December 27, 1911, Edmond E. Foster, one of the plaintiffs, executed a release to the defendant in which he acknowledged the "receipt of twenty dollars (\$20.00) in full . . . payment for all past and future cutting of wood . . . occasioned by keeping cleared without further payment therefor a strip of land substantially 50 feet in width on either side of the centre line of the transmission lines of the Connecticut River Transmission Company as now constructed . . . and for all damages . . . arising from the exercise of the rights to erect, maintain and operate said transmission lines as granted by deed dated Sept. 3, 1909." This release also stipulated: "I further acknowledge that the lines as now erected are satisfactorily located in accordance with said deed which I hereby ratify and confirm."

In October, 1914, the defendant placed one chestnut pole between each of the two existing towers, and one pole beyond "the outside tower at each end of the line on said land." These poles were twenty-three or twenty-four feet high, and connected only with the telephone wires at the place where the weights and bars had previously supported them.

The plaintiffs contended that these telephone poles were extra poles within the meaning of the deed, and that they are entitled to \$5 for each one hundred feet of land covered by the wires strung upon the same. Edmond E. Foster was the only witness, and at the conclusion of his testimony the judge * directed a verdict for the defendant.

No additional wires, towers or poles have been placed on the land since September, 1909, with the exception of the so called extra poles, supporting the telephone wires. These telephone wires were in place when the deed of September, 1909, was delivered.

The deed does not designate what particular part of the land is to be crossed by either the "single or double line of poles or towers."

By the conveyance creating the easement over the plaintiffs' land the defendant was given the right to repair and maintain a single line of poles or towers and the wires strung upon the same, and also a double line of poles or towers and the wires strung upon the same, with the necessary anchors, guys and braces to

* Hall, J.

protect the same. These poles between towers, supporting the wires in place of the weights and bars, are not "anchors, guys," or "braces," as these words are used in the contract; and the construction of this additional pole line is not a repair or maintenance within the terms of the grant. If in order to support the existing wires it became necessary to erect an additional line of towers along the line already crossed by the wires, the erection of such towers could not be considered a repair within the language of the deed, even if the towers were intended to take the place of the weights and bars and were constructed where they formerly had been; nor could such a line of towers come under the designation "anchors, guys and braces." The same construction applies equally to a line of poles, such as the line in question, which the defendant has erected since the delivery of the deed in September, 1909.

We assume in favor of the defendant, but do not decide, that the conveyance gave authority to the defendant to string the telephone wires from tower to tower, or that, if this right was not given thereby, the plaintiffs' acknowledgment in the release of December 27, 1911, "that the lines as now erected are satisfactorily located . . . which I hereby ratify and confirm," was equivalent to an authorization to continue these telephone wires as they were then existing. Notwithstanding this assumption, we think the line of poles erected was not within the intent and purpose of the contract. The contract did not give the defendant the right to construct a second line of towers or poles merely to carry and support the existing wires; it gave it the right to erect a second or double line of poles or towers for the purpose of carrying an additional line of wires strung upon the same, and from pole to pole and tower to tower. The defendant had the right to erect a second line of wires, and the towers and poles necessary to support and sustain it. The space crossed by the existing single line measured the compensation paid the plaintiffs, and for each one hundred feet of land crossed by the line the defendant paid \$5 "for a single line of poles or towers." This language, we think, excludes an additional line or double line of poles to carry this same body of wires, and the second line of poles when constructed was to be paid for in the same way, that is to say, at the rate of \$5 for each one hundred feet crossed by the wires strung upon the same.

The plaintiffs did not convey the title to the land crossed by the wires; they did not grant the defendant the privilege of placing an unlimited number of poles or towers within this area; the defendant was given merely an easement to cross the plaintiffs' land with a single line of poles or towers, not a single line of poles and towers, or more than one line of towers or poles to support these same wires. Foster, by his release of December, 1911, accepted by the defendant, shows that the line of wires with the single line of towers, as then located and before the poles in question were erected, was "satisfactorily located in accordance with said deed." The number of poles or towers was not stipulated in the deed. Assuming that the defendant was authorized therein to place as many towers or poles as were necessary to carry the wires in the original construction of the line, in our opinion it was not thereby authorized, after the structure was completed and the line in operation, to further occupy the plaintiffs' land with this line of "extra poles" within the space covered by the already existing wires and for the purpose of their support, these poles being neither a repair, nor "anchors, guys and braces," as stated in the contract.

We think the "extra poles" mentioned in the instrument of conveyance, for which the plaintiffs were to be paid according to the extent of the land crossed by the wires strung on them, were such poles as were to be used in constructing the additional or double line of wires; and these poles for which the plaintiffs now seek to recover in an action of contract cannot be considered a double line of poles within the meaning of the deed.

The defendant, therefore, had no right to erect the poles where it placed them and for the purpose for which it constructed them. In so doing it was not protected by the contract and was trespassing on the plaintiffs' rights. But it does not follow from this that the plaintiffs can recover in the present form of action. If before the entry of final judgment a motion should be filed by the plaintiffs to amend the action into an action of tort, its disposition would be within the discretion of the Superior Court. *Childs v. Boston & Maine Railroad*, 213 Mass. 91.

Exceptions overruled.

H. W. Blake, for the plaintiffs.

R. Y. FitzGerald, for the defendant.

TIMOTHY DRISCOLL vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. October 20, 1915. — April 11, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway, In use of highway, Proximate cause. *Proximate Cause*.
Boston, Street traffic regulations. *Words*, "Right of way."

In an action against a corporation operating a street railway in Boston for personal injuries sustained by reason of the plaintiff being thrown to the ground from the seat of a wagon in which he was driving when the wagon was struck by a car of the defendant, there was evidence that the plaintiff was driving four heavy horses attached to a wagon about twenty-five feet long, called a caravan, the whole length of horses and wagon being fifty-five feet, that he drove out from a private way, called Union Wharf, into Commercial Street, intending to turn to the left and for that purpose to cross the street, that, as soon as he could see past a building on his left, he saw a car of the defendant approaching from the left on the nearer track at the rate of about ten miles an hour, which was the ordinary speed for cars in that neighborhood, that the car was then from one hundred and fifty to two hundred feet distant, that when he got into Commercial Street his pole horses had got upon the track, the leaders being ahead of them, that he then looked again and saw that the car was within fifty or sixty feet from him, that his horses were walking, going at the rate of about three miles an hour, that he supposed that the motorman would retard the car a little so as to let the whole of the plaintiff's wagon get over the track, that therefore he permitted his horses to continue at a walk and the car struck "just within the rear wheel of the wagon, the hind end of the wagon," that the wagon "was shoved" about fifteen feet and the plaintiff was thrown out and injured. There was put in evidence a street regulation of the city of Boston providing that, with certain exceptions, "street cars shall have the right of way between cross streets over all other vehicles; and the driver of any vehicle proceeding on the track in front of a street car shall immediately turn out on a signal by the motorman or conductor of the car." *Held*,

1. That there was evidence that the plaintiff was in the exercise of due care.
2. That, although the private way was not a cross street and under the street regulation the defendant's car had the right of way, such right was one of precedence and not of exclusive enjoyment, and that, whether it was reasonably practicable for the plaintiff to drive out from the private way in any other manner than by crossing the defendant's tracks and thus whether the regulation was violated, were questions of fact.
3. That, if the jury should find that the regulation was violated, it then would be a question of fact whether such violation was a proximate cause of the plaintiff's injury.
4. That it could not be ruled as matter of law that the defendant's motorman was not negligent, as it might have been found that, although the rate of speed of the car was not excessive, the motorman by slightly checking the progress of

the car might have avoided the accident, and, although the car had the right of way, this did not give the motorman a right to run into the plaintiff's wagon if this reasonably could be avoided, so that the question of the negligence of the motorman also was for the jury.

TORT by the driver of a four horse caravan for personal injuries sustained by reason of being thrown from his seat to the ground by being run into by a street railway car of the defendant on Commercial Street in Boston on September 17, 1913. Writ dated October 23, 1913.

In the Superior Court the case was tried before *Lawton, J.* At the close of the plaintiff's evidence, which is described in the opinion and a footnote, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

F. J. Daggett, (P. Mansfield with him,) for the plaintiff.

W. G. Thompson, (G. E. Mears with him,) for the defendant.

RUGG, C. J. The material testimony is not in dispute. The plaintiff drove a long wagon called a caravan, drawn by four heavy horses, two on the pole and "two leaders," from a comparatively narrow private way, called Union Wharf, straight out into Commercial Street in Boston, intending to cross the street and turn to the left. As he drove sitting on the right of the seat, his view was obstructed to his left until he passed a building. His "leaders" were on the car tracks of the defendant before the plaintiff could see anything in that direction. The distance from the noses of the leader horses to the extreme rear end of the wagon was fifty-five feet. The wagon was about twenty-five feet long. The rate of speed of the horses was about three miles an hour. There was a car coming from his left on the track nearest to the curb as he drove out, at a uniform rate of about ten miles an hour, which was the ordinary speed for cars in that neighborhood. This car struck "just within the rear wheel of the wagon, the hind end of the wagon," and "it was shoved" about fifteen feet. The plaintiff testified: "Driving out, I came to the end of this building and I looked both ways. I see a car coming within one hundred and fifty to two hundred feet of me. I kept going along. When I got out, my pole horses got on to the track. I looked again and the car was within fifty or sixty feet of me. . . . Walking slow. . . . My horses were walking." "Q. And you supposed the motorman, being one hundred and fifty feet back, and going as you

say at his usual speed, would, if it was necessary, slow up a little to let you by? . . . A. Yes. — Q. . . . That was the reason why you didn't speed up your horses a little, wasn't it? A. Yes, sir. — Q. . . . You felt that you had a long wagon there, — A. Yes, sir — Q. — and if you got your horses on to the track in time so that he could, by slowing up a little, let you get the whole wagon over, it was his duty to do it? A. Yes, sir. — Q. That was your idea? A. Yes, sir. . . . — Q. Take it as you were driving out, straight across Commercial Street with that team and those horses then. Can you speed them up quickly or not? A. Yes, sir. — Q. How quickly? A. A short distance. About five miles an hour, I should think."

1. The question of the plaintiff's due care, in the opinion of a majority of the court, was for the jury. Such a long and cumbersome vehicle as that driven by the plaintiff is not an outlaw. It is entitled to the rights of a traveller on the public ways. It is matter of common knowledge that use of such wagons is frequent. They must often come out from between buildings. Whether under all the conditions confronting him the plaintiff reasonably could have urged his horses forward at a faster pace in time to have avoided the collision was a question of fact. The case on this branch is governed by *Creavin v. Newton Street Railway*, 176 Mass. 529, *Farris v. Boston Elevated Railway*, 210 Mass. 585, and cases of that class. It is not a case where the plaintiff trusted entirely to the care of the motorman, as in *Lawrence v. Fitchburg & Leominster Street Railway*, 201 Mass. 489. The jury may have felt that, in view of all the circumstances, including the distance of the car away when first seen by the plaintiff, he was acting as a reasonably prudent man ought to act in trying to get upon the side of the street where the law of the road required him to be.

2. There were introduced in evidence two sections of the street traffic regulations of Boston.* The plaintiff knew of these regula-

* The first two sections of article 3 of the Street Traffic Regulations and Rules for Driving of the City of Boston are as follows: "Section 1. Police, Fire Department, emergency repair wagons, United States mail vehicles and ambulances shall have the right of way in any street and through any procession.

"Section 2. Subject to Section 1 of this article, street cars shall have the right of way between cross streets over all other vehicles; and the driver of any vehicle proceeding on the track in front of a street car shall immediately turn out on a signal by the motorman or conductor of the car."

tions. It strenuously is urged that the plaintiff violated § 2, that this violation was a contributing proximate cause of his injury, and hence that he cannot recover.

This was a place to which the regulation applied. The private way out of which the plaintiff was driving manifestly was not a cross street. It was not even an intersecting street, for it was not a street at all. Therefore the cars of the defendant had the right of way.

The definition of "right of way" in the regulation, put forward by the defendant, may be accepted in substance though with slight modification as meaning the right not to be hindered, obstructed or delayed by persons who reasonably can avoid hindering, obstructing or delaying the one who has by law precedence in using the right of way.

But it could not rightly have been ruled as matter of law that the plaintiff violated this regulation and that this illegal act was a contributing proximate cause of his injury. Whether the regulation was violated was a question of fact. It cannot be presumed that it was the purpose of the regulation to prohibit the traffic of vehicles such as that driven by the plaintiff to Union Wharf and other similar places. That would not naturally have been done by indirection, but expressly. The right of way accorded to the street car by the regulation was a right of precedence, not of exclusive enjoyment. Other travellers may use the portion of the street where the tracks are laid, subject to that precedence. Whether it was reasonably practicable to drive out in any other way than by crossing the tracks of the defendant, and whether thus the regulation was violated, were questions of fact.

3. It also was a question of fact whether the violation of the regulation was a proximate cause of the plaintiff's injury, or only an attendant circumstance. In this respect the case is governed by *Newcomb v. Boston Protective Department*, 146 Mass. 596, *Moran v. Dickinson*, 204 Mass. 559, and *Bourne v. Whitman*, 209 Mass. 155, where the controlling principles of law have been expounded by eminent justices. They need not be repeated.

4. It could not have been ruled as matter of law that the motor-man of the defendant was not negligent. It might have been found that the wagon was almost out of the path of the car and that, although the speed of the car was not excessive, a slight

checking of its progress might have avoided the accident. *Jedfrey v. Boston & Northern Street Railway*, 198 Mass. 232. *Callahan v. Boston Elevated Railway*, 205 Mass. 422. Even though the street car had the right of way, that might have been found not to justify a running into a vehicle like that of the plaintiff under the circumstances here disclosed. The precedence in the use of the street afforded to the street car by the regulation did not warrant the motorman in running into a vehicle on the track if this could reasonably be avoided, nor in failing to keep a lookout for other travelers. See *Chicago, St. Paul & Kansas City Railway v. Chambers*, 15 C. C. A. 327; *New York & Greenwood Lake Railway v. New Jersey Electric Railway*, 31 Vroom, 52, 59; *Chicago & Alton Railroad v. Rockford, Rock Island & St. Louis Railroad*, 72 Ill. 34; *Pratt v. Chicago, Milwaukee & St. Paul Railway*, 38 Minn. 455.

Exceptions sustained.

JOHN GOUZOULAS vs. F. W. STOCK AND SONS.

F. W. STOCK AND SONS vs. JOHN GOUZOULAS.

Essex. February 28, 1916. — April 11, 1916.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Claiming trial by jury, Exceptions. *Contract*, In writing, Performance and breach, Waiver. *Waiver*.

In an action at law, where the defendant had claimed a jury trial and, when the case came on for trial, waived the claim and moved to have the case taken from the jury list, whereupon the plaintiff moved orally for a trial by jury, and where the presiding judge denied the defendant's motion to have the case taken from the jury list and ordered that the trial proceed before a jury, it was held, that, although the judge was wrong in denying the defendant's motion, because a party claiming a trial by jury has a right to waive that claim, yet this error did the defendant no harm and would not support an exception, because the plaintiff had a right to move orally for a trial by jury and the judge had power to grant that motion as he did.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties.

CARROLL, J. These two actions were tried together. The first was brought by John Gouzoulas against F. W. Stock and Sons, a corporation, hereinafter called the defendant, to recover dam-

ages for the non-delivery of flour. The second was against Gouzoulas to recover damages for his failure to accept and pay for the flour. In each case he had a verdict. He will be hereafter referred to as the plaintiff.

1. The defendant duly claimed a jury trial. Before the jury was impanelled, the defendant, in writing, waived this claim, and moved to have the cases heard by the judge.* The motion was opposed by the plaintiff who orally moved for a trial by jury. The bill of exceptions says, "The court refused to allow the motion of the defendants' attorney to take the cases from the jury list and ordered trial to proceed before a jury." If this record be strictly construed, it is apparent there was error in denying the motion of the defendant to transfer the cases from the jury list. A party claiming a jury trial has the undoubted right to waive this claim, and the motion of the defendant was refused improperly. *Walcott v. O'Connor*, 163 Mass. 21. *Stevens v. McDonald*, 173 Mass. 382.

It is also true that it was within the power of the judge to grant the plaintiff's motion and order the cases to be tried by a jury. R. L. c. 173, § 56. *Dolan v. Boott Cotton Mills*, 185 Mass. 576. By granting the motion of the plaintiff, the judge ordered the cases to be tried before a jury. This he could do; and, therefore, there was no harmful error in denying the defendant's motion.

2. In September, 1909, the parties contracted for the delivery by the defendant to the plaintiff of two hundred and five barrels of flour "to be ordered out within Oct. 20 from date. Flour carried for convenience of buyer beyond contract period shall bear a charge of 5c per barrel."

December 2, 1909, the plaintiff signed a letter, written to the defendant by one of its agents, which read as follows: "Order my car flour out at once. I want it here by the last of Dec."

December 6, 1909, a contract was made for two hundred and ten barrels of flour to be shipped at once. It stipulated that "Flour, carried for convenience of buyer beyond contract period, shall bear a charge of 5c per barrel."

December 28, 1909, the defendant wrote the plaintiff, ". . . I discovered that my shipping directions for your car had been overlooked . . . , however, we are rushing off the shipment with

* *Hardy, J.*

tracer and it will be in your place within 10 or 12 days. If you should need any flour to last you until this car arrives, you can let our office know . . . and our stenographer will give you an order on the Lynn Storage Co. for such amount as you may need, the price on any more flour will be \$5.50 at storage."

In instructing the jury, the judge stated that the parties could subsequently modify the contract of September 8, 1909; he called their attention to the letter of December 2, 1909; to the fact that there was some conversation between the plaintiff and the agent of the defendant, and said, "Under those circumstances if both parties agree there would be evidence showing the waiver on the part of Stock and Sons of any claim for storage, if it was so understood that the goods might be delivered, about the last of December . . . if that was so . . . there could be no claim . . . for storage."

The jury were instructed, in reference to the letter of December 28, 1909, that the plaintiff was not responsible for the error caused by the delay in the shipping directions. There was evidence, not reported, tending to show that the flour was carried by the defendant from October 20, 1909, to December 2, 1909, for the benefit of the plaintiff.

The defendant excepted to that part of the instructions relating to the carrying charge, contending that the contract, being in writing, could not be modified by parol. It is clear that the parties could change the terms of the written contract by a subsequent oral agreement. *Thomas v. Barnes*, 156 Mass. 581. The jury could find from the statements contained in the letters, from the conduct of the parties and all the evidence in the case, that the part of the contract providing for a storage charge of five cents per barrel after October 20, 1909, was waived by them.

We see no error of law in the judge's charge.

Exceptions overruled.

The cases were submitted on briefs.

H. L. Baker & R. B. Skinner, for F. W. Stock and Sons.

S. H. Donnell, for Gouzoulas.

CHARLES C. JONES vs. CARLOS S. JONES & others.

Norfolk. March 7, 1916. — April 11, 1916.

Present: LORING, CROSBY, PIERCE, & CARROLL, JJ.

Probate Court, Vacation of decree, Jurisdiction. Judgment.

On a petition to vacate a decree of the Probate Court made more than twelve years before the filing of the petition, it appeared that the decree sought to be vacated declared that the petitioner had died more than seven years before that time and ordered the distribution of a fund that had been deposited in a savings bank for his benefit, directing the bank to pay the fund to the petitioner's two sons, who were his only heirs and next of kin, which was done, that the fund was the share to which the petitioner was entitled under the residuary clause of his mother's will, that when his mother died he was in the Philippine Islands, that he did not learn of her death nor of the petition of his sons for the distribution of the fund until many years thereafter, that before filing his petition to revoke the decree he was unable to come to this Commonwealth and unable to prove his indentity without coming here, and that after learning of the proceedings and the decree he used due diligence in filing his petition. *Held*, that the decree must be vacated and a decree entered establishing the petitioner's right to the fund as against his sons, but imposing no liability upon the savings bank for paying over the fund by order of the Probate Court, the decree of that court, which distributed a fund over which the court had jurisdiction, not having been void *ab initio* but having been in force up to the time of its correction.

CARROLL, J. This is a petition, filed on November 5, 1913, to vacate a decree of the Probate Court of June 19, 1901.

The will of John Coffin Jones was proved and allowed in the Probate Court for the county of Norfolk, January 11, 1862. The rest and residue of his estate was given to a trustee, to pay the income to the testator's widow during her life and on her death to pay to each of his children "when and as they shall arrive at full age his or her share thereof or their heirs respectively."

Mrs. Jones, the widow, died June 5, 1900, and thereupon the petitioner became entitled to one sixth of the fund. He was, at this time, in the Philippine Islands, and did not learn of the death of his mother for many years.

After the death of the mother, the then trustees, under a decree of the Probate Court, deposited in the Dedham Institution for Savings, in the name of the judge of probate for the benefit of the

petitioner, \$12,751.94, his share of the fund, and filed the bank book in that court.

January 18, 1901, Carlos Selby Jones and George Herbert Jones presented a petition to the Probate Court reciting that Charles C. Jones, the petitioner, died intestate before January 1, 1894, the exact date and place of his death being unknown, praying that the sum of \$12,751.94 might be paid to them as "sole heirs at law and distributees of your petitioner." June 19, 1901, a decree was entered on that petition which recites, that it appeared Charles C. Jones, had died some time before January 1, 1894, that Carlos Selby and George Herbert Jones were his only children and heirs, and ordering the Dedham Institution for Savings to pay over and transfer to them in equal shares the amount thus held by it with any accumulations thereon.

This petition to vacate the decree of June 19, 1901, was dismissed in the Probate Court. On appeal to this court, the single justice * on the evidence submitted, which included the testimony of the petitioner, Charles C. Jones, found the material facts to be as stated in the petition; he ordered the decree of the Probate Court to be vacated, and reported the case upon the findings and pleadings.

It is well settled that probate courts have the power to correct errors or mistakes in their own decrees, and when a decree is based upon a mistake of fact, as in the decree of the Probate Court in the case at bar, it should be amended. *Waters v. Stickney*, 12 Allen, 1. *McCooley v. New York, New Haven, & Hartford Railroad*, 182 Mass. 205.

Inasmuch as this petition to vacate the decree was not brought until November 5, 1913, it is contended that the petitioner is guilty of laches, and for that reason there should be no correction of the decree. The single justice, in finding that all the material facts of the petition were true, found that the petitioner did not learn of his mother's death, nor of the petition of his sons, until many years thereafter; that he was unable to come to Massachusetts or to prove his identity without coming to Massachusetts, and that he used all due diligence in bringing this petition after learning of the proceedings and the decree. The single justice

* *Braley, J.*

heard the evidence. It is not reported and it is not before us. Obviously we cannot say that his conclusion was wrong. See *Tucker v. Fisk*, 154 Mass. 574; *Sunter v. Sunter*, 190 Mass. 449; *Dickinson v. Todd*, 172 Mass. 183.

The petitioner relies on the case of *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, where a decree appointing an administrator over the estate of a living person was declared to be void *ab initio*; he argues that the decree, directing the payment of the fund to his sons, was void and of no effect from its inception, and that, therefore, not only should it be vacated, but that the Dedham Institution for Savings, which acted in obedience to it, should be ordered to restore the money to him.

In the *Jochumsen* case the decree was void because the Probate Court assumed a power not given it by law. It was not merely a mistaken use of its jurisdiction, it was an assumption of jurisdiction where it had none. The Rev. Sts. c. 64, § 4, now R. L. c. 137, § 1, gave authority to appoint administrators upon the estates of deceased persons, and the plaintiff being alive, the decree was entirely void.

In the case at bar there was a fund over which the Probate Court of Norfolk County had jurisdiction. It came under its jurisdiction by the father's will; and under R. L. c. 150, §§ 23-26, after the mother died it had the duty of preserving and distributing it to the rightful owners. Because the judge, through error and mistake, ordered payment of the money to those to whom it did not belong, it cannot be argued that he was without jurisdiction. He had jurisdiction over the fund, but he made an erroneous exercise of it, and in such a case the decree can be corrected, but it is not void from the beginning. See R. L. c. 136, § 3.

If the decree was one which the court had no power to make, or if there was no authority for the action of the court, there would be force in the plaintiff's contention. *Davis v. McGraw*, 206 Mass. 294. *O'Herron v. Gray*, 168 Mass. 573, 578.

The action of the court in ordering the distribution of the rest and residue of the estate of John Coffin Jones was analogous to a proceeding *in rem*, and the subject matter, that is to say, the fund comprising a part of his estate being within the jurisdiction of the court, the court was given authority over its payment, and it was the duty of the bank to pay according to its decree. *Pierce v.*

Prescott, 128 Mass. 140. *Loring v. Steineman*, 1 Met. 204. *Whitwell v. Bartlett*, 211 Mass. 238. *Chase v. Thompson*, 153 Mass. 14.

In *Cleveland v. Draper*, 194 Mass. 118, where a decree ordered the distribution of an estate to the wrong person, it was held that the court had jurisdiction, and, while the decree was amended in part, it was provided therein that no liability should be imposed upon the administrator who acted in good faith under the decree.

Where an heir of a testator, entitled to share in the rest and residue of his estate, through mistake was not named in the decree of distribution, she petitioned to modify the decree so that the executor should be directed to pay her one eleventh of the rest and residue. In this court it was ordered that the decree be modified, so that payment should be made to the petitioner and to ten others in equal shares of one eleventh each; but it was expressly directed in the order for a decree that the executor should not be required to take further action, nor any liability be imposed upon him, that he should correct the error and establish the petitioner's rights to her share as against the other distributees, and give to her and the executor such rights against them as would arise from the correction of this error. *Harris v. Starkey*, 176 Mass. 445.

We think the last two cited cases are decisive of the case at bar. While the plaintiff's rights to the fund must be established, the Dedham Institution for Savings, which acted in obedience to a decree of the Probate Court, must be protected from liability for such action. See also *Crocker v. Crocker*, 198 Mass. 401, 410; *Tobin v. Larkin*, 187 Mass. 279, 282; *Minot v. Purrington*, 190 Mass. 336, 340; *Shores v. Hooper*, 153 Mass. 228.

The Probate Court of Norfolk County, having jurisdiction over the estate of John Coffin Jones and control of the property which he left in trust, had authority to distribute the same; having this power over the fund, the petitioner was not deprived of his constitutional rights, nor his property taken from him without due process of law, because the court made a wrong decision based on incorrect evidence. See *Adams v. Adams*, 211 Mass. 198; *Rothschild v. Knight*, 176 Mass. 48; S. C. 184 U. S. 334; *Nelson v. Blinn*, 197 Mass. 279, where the constitutionality of the absentee statute, R. L. c. 144, St. 1904, c. 206, was passed on, *Blinn v. Nelson*, 222 U. S. 1; *Attorney General v. Provident Insti-*

tution for Savings, 201 Mass. 23; *Provident Institution for Savings v. Malone*, 221 U. S. 660.

A decree is to be entered reversing the decrees of the Probate Court of June 19, 1901, and October 21, 1914, and establishing the petitioner's right to the fund drawn from the Dedham Institution for Savings but imposing no liability upon the bank for paying over the fund as directed by the order of the court.

So ordered.

J. E. Gardner, Jr., (of Minnesota) for the respondents Carlos S. and George Herbert Jones.

H. M. Davis, for the Dedham Institution for Savings.

W. R. Scharton, for the petitioner.

JOHN W. MATTHYS vs. FIRST SWEDISH BAPTIST CHURCH OF BOSTON.

Suffolk. March 20, 1916. — April 11, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Easement, By prescription. *Equity Jurisdiction*, To enjoin continuing trespass.

Where for a period of more than twenty years the roof of a building openly and conspicuously has extended four feet over the adjoining land, causing water to drip and snow and ice to fall thereon, the boundary line between the two lots of land running through the centre of the wall of the building over and beyond which the roof extends, and where during this period there have been different successive owners of both of the lots of land but the lots never during the period have been owned by the same person and the extension of the roof beyond the boundary always has been maintained under a claim of right, an easement by prescription has been established, and a bill in equity by the owner of the servient estate to restrain the owner of the dominant estate from permitting the roof to project over the plaintiff's premises must be dismissed.

CARROLL, J. The plaintiff and the defendant own adjoining estates. The roof of the defendant's church, built before 1860, extends a distance of four feet over the plaintiff's land, permitting snow and ice to fall thereon.

In 1883 title to the above estates was in the same owner. December 5 of that year the land now owned by the plaintiff was

conveyed to a predecessor in title by deed, which established as the division line between the two tracts "a straight line through the centre of the Westerly wall of the stone meeting house now standing on the corner of said Shawmut Avenue and Rutland Street and now owned by grantor 100 feet to Newland Street; and this last named line shall be the center line of a partition wall which the parties hereby establish." This deed also contained the stipulation, "And said lot is conveyed with this restriction, to wit: 'The said grantee . . . shall not erect . . . on the granted premises any building opposite the three windows as marked on said plan (being the 2nd, 3d and 4th windows in the audience room of said stone church counting from Shawmut Ave.) which shall come nearer to said windows from the southerly side of said 2nd window to the northerly side of said 4th window than a perpendicular plane parallel to side wall and five feet distant therefrom. . . . This restriction shall hold in force only so long as the adjoining lot and building shall be used by the grantor, its successors or assigns, as a meeting house or church." All the mesne conveyances contain these same provisions.

In 1884 the common owner conveyed the church lot to the First Free Will Baptist Society of Boston, from whom the defendant by mesne conveyance derived title.

This is a bill in equity to restrain the defendant from permitting its roof to project over the plaintiff's premises. In the Superior Court the bill was dismissed, the judge * finding that "There has been no change in the structure of the buildings on the premises for more than twenty years, and no change in the method of their use. And any use has been continuous, open and under claim of right." The case is before us on a report.

For more than twenty years the church has stood on this same place, with its roof projecting over the land of the plaintiff. This has been open and plain to be seen. The use has been continuous and unbroken, under a claim of right, not merely permissive. The judge who heard the evidence so found. It is too clear for discussion that from such an unbroken, notorious and adverse occupation, extending over such a period, a title by prescription arises. R. L. c. 130, § 2. *Porter v. Howes*, 202 Mass. 54. *Keats v. Hugo*, 115 Mass. 204, 217.

* *Wail, J.*

The projection was of such a kind and so open that the owner of the servient estate must have known it. There is nothing in *Buss v. Dyer*, 125 Mass. 287, which conflicts with the rulings and findings of the court. Because the occupation was continuously open and adverse, the defendant's prescriptive title is not disturbed by the fact that during the period there were different owners of both the dominant and servient estates. *Leonard v. Leonard*, 7 Allen, 277.

The plaintiff contends that no evidence is stated in the report that the several successive owners claimed this easement. The judge found that the use of the roof was under a claim of right. This is a finding that each owner claimed the right to have the roof project over the plaintiff's land.

Nor is the defendant estopped, as the plaintiff claims, because the boundary line is through the centre of the westerly wall of the stone meeting house. The line divides the two estates. There is nothing in this language which works an estoppel on the defendant, or deprives it of its title to the easement over the plaintiff's land.

Since the defendant has a right by prescription to maintain the projecting roof, it is unnecessary to pass upon the question of its title by implied reservation, created by the deed of December 5, 1883.

Final decree dismissing the bill affirmed.

J. M. Browne, (J. T. Maguire with him,) for the plaintiff.

T. Von Rosenvinge, for the defendant, was not called upon.

JERRY PECOTT'S CASE.

Suffolk. March 23, 1916. — April 11, 1916.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Medical and surgical attendance. Physicians and Surgeons.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, that "Where, in a case of emergency or for other justifiable cause, a physician other than the one provided

by the association is called in to treat the injured employee, the reasonable cost of his services shall be paid by the association, subject to the approval of the Industrial Accident Board," that board has no right to approve the bill of an outside physician, where the employee was injured shortly before the closing at noon on a Saturday of the mill in which he worked, on that afternoon felt intense pain and consulted an outside physician, who advised an operation, and on the following Wednesday was operated upon for hernia by the outside physician, there being nothing to indicate that, when the operation was performed on the fourth day after the accident, there was any emergency or any other justifiable cause for the operation not being performed by one of the physicians provided by the insurer, of whose names the employee had been notified by notices posted in the mill where he worked.

An employee's ignorance of his rights and obligations under the workmen's compensation act does not excuse him from compliance with its requirements. Following *McLean's Case*, *ante*, 342.

APPEAL to the Superior Court from a decision of the Industrial Accident Board approving a bill of Dr. Francis A. Cregg for the sum of \$50 to be paid by the insurer for performing an operation for hernia on the employee Jerry Pecott on November 4, 1914, Dr. Cregg being the family physician of Pecott and not one of the two physicians provided by the insurer.

The case was heard by *McLaughlin*, J. The facts found by the Industrial Accident Board are stated in the opinion. The judge made a decree affirming the decision of the Industrial Accident Board and ordering the insurer to pay Dr. Cregg "\$50, said sum being a reasonable fee for the services performed under the statute." The insurer appealed.

The case was submitted on briefs.

E. C. Stone, for the insurer.

M. A. Cregg & H. A. Cregg, for the employee.

CARROLL, J. The employee was injured Saturday, October 31, 1914, between half past eleven and twelve o'clock. As usual on Saturday, the mill closed at noon. In the afternoon, the pain from the injury became intense and he consulted Dr. Cregg, who advised an operation. Monday the employee made an attempt to notify his foreman of the injury, and, failing in this, he left word by telephone with one of the office employees. Wednesday, November, 4, 1914, he was operated on for hernia.

At the time the employee was injured there were posted in the mill where he worked printed notices informing employees that in case of injury Dr. Carl R. Moeckel or Dr. Howard L. Cushman

was to be called and that "bills of other physicians will not be paid by the insurance company." No attempt was made to notify these physicians of the injury, the employee making no effort to secure their services. Dr. Cregg performed the operation. It is agreed his charge is reasonable. The question is whether under these circumstances the company is required by the workmen's compensation act to pay for the services of a physician not furnished by it, but selected by the employee.

Under the workmen's compensation act, the reasonable medical services required during the first two weeks after the injury are to be furnished by the insurer, the duty of supplying medical aid being imposed upon the insurance company with the obligation of paying therefor. The right to select the attending physician is given to it by the statute. It is evident, we think, that the Legislature in passing this act did not intend to give to the employee the privilege or right of selecting his own physician at the expense of the insurer. Under the amendment of 1914,* where a physician other than the one provided is called in case of an emergency, or for other justifiable cause, the insurer is required to pay for this service, if in the opinion of the Industrial Accident Board the charge is reasonable and the cause of employment justifiable. The purpose of the Legislature in passing this amendment was not to deprive the insurer of the right to select its own physicians. By this change in the law provision was made for the case of emergency, where there was imminent danger, where the suffering and pain were severe, where immediate attention was required and the services of the insurance physician could not be obtained in time to give relief. The amendment also was intended to apply to a

* St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, is as follows: "During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then from the time of such incapacity, and in unusual cases, in the discretion of the board, for a longer period, the association shall furnish reasonable medical and hospital services, and medicines, when they are needed. Where, in a case of emergency or for other justifiable cause, a physician other than the one provided by the association is called in to treat the injured employee, the reasonable cost of his services shall be paid by the association, subject to the approval of the Industrial Accident Board. Such approval shall be granted only if the board finds that there was such justifiable cause and that the charge for the services is reasonable."

situation where there was no actual emergency, but where the employee, acting as a reasonable man, would be justified in refusing the care of the physician selected by the company. There is nothing in the record of this case to show such an emergency or any cause which would justify a reasonable man in neglecting to seek the attention of the physicians named.

Even if on Saturday afternoon, when the pain was intense, an emergency then existed which made it prudent to call Dr. Cregg, and he could respond more quickly than the physician of the company, and the employee was justified in sending for him, (which we are not called upon to decide,) there is nothing in the evidence which discloses any such emergency existing on the Wednesday following when the services were rendered, and nothing is shown which would justify the employee in failing to secure the services of the physicians offered by the insurer.

In *Panasuk's Case*, 217 Mass. 589, it was held that the employee, an "illiterate foreigner who is unable to read, write or understand the English language," was not bound by a notice printed in English. In the case at bar the employee could read and speak English; notices were conspicuously posted; we think he was charged with knowledge of them and their contents and there is no evidence which justified him under the statute in neglecting to secure the services of either of the physicians named. *Daniels v. New England Cotton Yarn Co.* 188 Mass. 260.

His ignorance of his rights and obligations under the workmen's compensation act cannot excuse him from compliance with its terms. *McLean's Case*, ante, 342.

Decree reversed.

HORACE E. ROTHWELL vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 26, 1915. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Railroad, Liability for collision at crossing. Negligence, Gross.

At the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a highway between a train of the defendant and an automobile driven by the plaintiff, where the plaintiff, upon showing that the defendant failed to give the signals required by law, is entitled to recover "unless it is shown that, in addition to a mere want of ordinary care," he "was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury," the presiding judge read to the jury certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. These passages related to the exercise of ordinary care by a person operating an automobile at a railroad crossing, and the judge said, "I read you that rule that you may have in your mind some standard of what is ordinary or due care." The judge also said, "And I am going to read to you from a decision of the Chief Justice of our Supreme Court with respect first as to what constitutes due care of the plaintiff under circumstances of this nature, and under circumstances involving the operation of an automobile over a grade crossing, because the law with respect to automobiles is a new one." Upon exceptions by the plaintiff, after a verdict for the defendant, it was *held*, that the language of the judge amounted to giving the instructions requested as rulings of law and that the jury would be warranted in believing that the words read to them measured the standard of the plaintiff's conduct, and consequently the plaintiff's exception to the giving of these instructions was sustained.

CROSBY, J. This is an action to recover for personal injuries caused by a collision between an automobile operated by the plaintiff upon a highway and a train of the defendant at a crossing of the way by the tracks of the defendant at grade. The case was submitted to the jury upon the first count of the declaration, founded upon the alleged failure of the defendant to give the signals required by law at railroad crossings. St. 1906, c. 463, Part II, § 245. The exceptions relate only to the defendant's eighth and ninth requests. The record recites: "The defendant requested

the court * to give the following instructions marked 8 and 9 and they were given so far as they are contained in that portion of the charge which follows, but were not read as separate instructions. 8. The jury in considering the plaintiff's duty must consider that an automobile can at a crossing be handled safer than a horse, and that a machine can be controlled easily and quickly, and that there is no danger from it if he stops to look and listen when within six feet of the track. 9. With proper care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town." Undoubtedly these requests were framed in view of the language used in the opinion in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, at pages 145, 146.

The question of the plaintiff's gross negligence before the jury required, first, a statement of the standard of due care; and second, an application of that standard to the conduct of the plaintiff to determine whether it fell so far short of such care as fairly to be described as grossly careless.

What the judge did in reading from the opinion of the court in *Chase v. New York Central & Hudson River Railroad* was to instruct them that the excerpt from that opinion was a rule of law as to due care. This is manifest, from the fact that after reading to the jury from the opinion in that case, the judge said: "Now, that is not the rule that obtains in this case. I read you that rule that you may have in your mind some standard of what is ordinary or due care." In order to assist the jury by way of illustration or

* The presiding judge was *Hall, J.* The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

St. 1906, c. 463, Part II, § 245, is as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing such as is described in section one hundred and forty-seven, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section sixty-three of Part I, or, if the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said section, unless it is shown that, in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

explanation the presiding judge could properly read to them the opinion in *Chase v. New York Central & Hudson River Railroad*.

The language of requests eight and nine, which appears in the opinion above referred to, did not purport to lay down rules of law for the conduct of travellers in passing over railroad tracks at grade with highways in all cases, but was used merely by way of illustration. While the presiding judge did not give these requests as separate instructions, he read that portion of the opinion in *Chase v. New York Central & Hudson River Railroad* which included the eighth and ninth requests, stating to the jury, "And I am going to read to you from a decision of the Chief Justice of our Supreme Court with respect first as to what constitutes due care of the plaintiff under circumstances of this nature, and under circumstances involving the operation of an automobile over a grade crossing, because the law with respect to automobiles is a new one."

A majority of the court are of opinion that this amounted to the giving of the requests as rulings of law and that the jury were warranted in believing that the words quoted measured the standard of the plaintiff's conduct.

As the rulings properly could not have been given, the entry must be

Exceptions sustained.

The case was argued at the bar in October, 1915, before *Rugg, C. J., Loring, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

J. W. Cummings, (C. R. Cummings & J. W. Nugent with him,) for the plaintiff.

F. W. Knowlton, for the defendant.

JOSEPH M. EVERETT vs. AMASA W. B. FOSTER.

Suffolk. November 4, 1915. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Fraud. Contract, Rescission. Assignment, For the benefit of creditors. Set-off.

In an action by the assignee for the benefit of creditors of an insolvent corporation, which had been a dealer in automobiles and motor vehicles as the sales agent of another corporation, to recover the amount of a subscription signed by the defendant to take and pay for at par a certain number of shares of the capital stock of the plaintiff's assignor, the defendant as a defence sought to rescind the contract on the ground that he was induced to subscribe for the stock by false representations made by the treasurer of the company. An auditor, to whom the case was referred under a rule that his findings of fact should be conclusive, found that the statement made to the defendant by the treasurer was that "the business was in a flourishing condition and that the company had a great many prospects for the sale of new cars and had made a number of contracts with subagents for the sale of cars and that he believed there was an opportunity or even certainty that the company would make a lot of money." The auditor also found "that it was explained to the defendant that the business [of the company for which the plaintiff's assignor was sales agent] had not been long established and had up to that time been run at a loss, but that [the plaintiff's assignor's treasurer] hoped and believed and stated that their prospects for success were good and that the business was flourishing." The auditor found that no misrepresentation of material facts had been made to the defendant, and judgment was given for the plaintiff. *Held*, that the finding was warranted that the treasurer of the plaintiff's assignor made no such misrepresentations as would give the defendant a right to rescind the contract.

A creditor of an insolvent corporation, who is liable to the corporation upon an unpaid subscription for shares of its capital stock, when sued upon his subscription by the common law assignee for the benefit of creditors of the corporation, cannot set off the debt of the corporation to him, but must pay for his shares in full and is entitled on his claim against the corporation only to his ratable share in the distribution of the assets among the creditors.

CROSBY, J. This is an action brought by the assignee for the benefit of the creditors of the Motor Vehicle Company to recover the amount of a subscription signed by the defendant to take twenty-five shares of the preferred stock of the company, for which he agreed to pay the sum of \$2,500, being the par value of the stock, it being agreed that upon payment for the preferred stock he was to receive, in addition to the preferred stock, \$2,500 par value of the common stock of the company.

The defendant contends that he was induced to subscribe to the stock by reason of certain false representations made by one Hatch who was the treasurer of the company.

The case was referred to an auditor and under the rule his findings of fact are conclusive. The defendant filed specifications of the fraud upon which he relied. The auditor has disposed of all contentions as to fraud adversely to the defendant. The only representation that calls for consideration by this court is the statement made by Hatch to the defendant that "the business was in a flourishing condition and that the company had a great many prospects for the sale of new cars and had made a number of contracts with subagents for the sale of cars and that he believed there was an opportunity or even certainty that the company would make a lot of money."

The business of the company was that of dealing in automobiles and motor vehicles. The auditor finds that the success of the business depended in a large measure upon the success of the Warren Motor Car Company, with which the Motor Vehicle Company had a contract to act as New England representative and sales agent; that the Warren Company became involved in financial difficulties in the latter part of the year 1912; and that "from all the evidence I find that it was explained to the defendant that the business had not been long established and had up to that time been run at a loss, but that Hatch hoped and believed and stated that their prospects for success were good and that the business was flourishing, and I am not satisfied that the defendant's first specification of fraud is sustained."

The finding of the auditor that no misrepresentation of material facts had been made was justified by the facts set forth in the report. The distinction between a fraudulent representation of a material fact and mere dealer's talk is clearly recognized. It is difficult to see how the statement that "the business was in a flourishing condition," when coupled with the further statement that the business up to that time had been run at a loss but that it was hoped and believed that it would later be successful, could have deceived the defendant as a prospective purchaser of stock. The representation that a business is in a flourishing condition is an expression too rhetorical and indefinite to be held as matter of law under the circumstances of this case to be a false representation

of fact. Such statements for the purpose of enhancing the value of property, either real or personal, are so frequently made in order to effect a sale that purchasers relying upon them are generally not held to be entitled to relief. Mere exaggeration or over-statement as to the value of shares of stock in a corporation do not afford any ground for the rescission of a subscription thereto any more than do similar statements concerning other kinds of property. Upon the same ground rest statements of matters of opinion or belief. It follows that statements that the company had a great many prospects for the sale of new cars and that there was an opportunity to make money in the future are not such misrepresentations as will avoid the contract. *Medbury v. Watson*, 6 Met. 246. *Brown v. Castles*, 11 Cush. 348. *Manning v. Albee*, 11 Allen, 520, 522. *Cooper v. Lovering*, 106 Mass. 77, 79. *Commonwealth v. Quinn*, 222 Mass. 504.

The defendant testified that he was released by the corporation from liability upon his subscription. The records of the company do not show any vote to that effect, and the auditor finds as a fact that there never was any release by the company to the defendant from his subscription contract.

On February 15, 1913, the Motor Vehicle Company, being insolvent, upon a demand made by the defendant executed a general assignment to the plaintiff for the benefit of its creditors, and on February 18, 1913, the defendant in writing assented to the assignment. The defendant contends that, if he is liable upon his subscription agreement, he is entitled to set off the amount of a loan of \$2,000 made by him to the company.

The rule established by the great weight of authority in many jurisdictions is that, in the absence of a statute to that effect, a creditor of an insolvent corporation cannot set off his debt in an action brought against him to recover for the benefit of all the creditors the amount due upon an unpaid subscription for stock. The creditor must pay for his shares in full and is entitled only to a ratable distribution of all the company's assets and to receive a dividend upon his claim against the corporation in common with other creditors. *Anglo-American Mortgage & Agency Co. v. Dyer*, 181 Mass. 593. *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411. *Sawyer v. Hoag*, 17 Wall. 610, 622. *Upton v. Tribilcock*, 91 U. S. 45. *Sanger v. Upton*, 91 U. S. 56. *Scammon v.*

Kimball, 92 U. S. 362. *Scovill v. Thayer*, 105 U. S. 143, 152. *Handley v. Stutz*, 139 U. S. 417, 427. See *v. Heppenheimer*, 3 Rob. 36, 79. *Holcombe v. Trenton White City Co.* 10 Buch. 122. *Ball Electric Light Co. v. Child*, 68 Conn. 522. *Appleton v. Turnbull*, 84 Maine, 72. *Richardson v. Merritt*, 74 Minn. 354. *Utica Fire Alarm Telegraph Co. v. Waggoner Watchman Clock Co.* 166 Mich. 618, 621. *Shickle v. Watts*, 94 Mo. 410. Morawetz on Private Corp. § 861. Cook on Corp. (7th ed.) § 193. *Grissell's Case*, L. R. 1 Ch. 528. The terms of the assignment by the debtor corporation to the plaintiff do not incorporate the provisions of our insolvent law except as to the kind of debts due from the assignor which can share in the distribution. R. L. c. 163, § 34, has no bearing on the question at issue.

The cases of *Merrill v. Cape Ann Granite Co.* 161 Mass. 212 and *Cromwell v. Parsons*, 219 Mass. 299, cited and relied on by the defendant, are plainly distinguishable from the case at bar.

*Judgment * affirmed.*

B. B. Libby, for the defendant, submitted a brief.

J. P. Draper, (*H. A. Baker* with him,) for the plaintiff.

DUDLEY A. SARGENT & others vs. CHARLES E. LEONARDI.

Middlesex. March 6, 1916. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Equitable Restrictions. Frauds, Statute of. Equity Jurisdiction, Mistake.

In a suit in equity to enforce an equitable restriction alleged to have been imposed on the defendant's land, if the alleged restriction is not contained in the defendant's deed nor in those of any of his predecessors in title and the deeds refer to a plan filed in the registry of deeds on which there is no indication of any restriction, the restriction cannot be imposed upon the land by oral evidence of an alleged intention on the part of the original grantor who divided a large tract of land into lots and filed a plan of them in the registry of deeds.

It does not help the plaintiff in a suit in equity to enforce an alleged equitable restriction not contained in the defendant's deed nor in those of any of his predecessors in title, to undertake to show that the alleged restriction was omitted from the defendant's deed by accident or mistake, the remedy to correct such a mistake, if there was one, being by a bill to reform the deed.

* For the plaintiff, entered by order of *Wait*, J.

In a suit in equity to enforce an equitable restriction alleged to have been imposed on the defendant's land, where it appears that no owner of the lot of land of which the defendant owns a part ever created any restriction upon it, a recital in a mortgage given by the owner of the part of the lot not owned by the defendant, stating mistakenly that the mortgagor's land is subject to the restriction in question, does not create such a restriction even upon his own land, still less on the land of the defendant.

In the present suit to enforce an equitable restriction alleged to have been imposed on the defendant's land, where it appeared that no owner of the land ever had created by deed any restriction upon it, it was *said*, that it was unnecessary to consider whether the statute of frauds would be a bar to the relief sought by the plaintiff.

CROSBY, J. This is a bill in equity brought to enforce certain restrictions upon the use of the defendant's land. The case was reserved by a judge of the Superior Court * for the determination of this court upon the pleadings, the agreed facts, and a summary of all the material evidence.

The evidence shows, that in 1847 the owners of a large tract of land in Cambridge caused it to be surveyed, divided into lots, and a plan thereof prepared, which was filed in the registry of deeds and is referred to as Plan 15.† Afterwards at various times the owners sold lots to different purchasers including lot No. 3, which was conveyed to one Randall in April, 1848, and was situated at the corner of North Avenue (now called Massachusetts Avenue) and Everett Street. The defendant is the owner of the front part of lot No. 3, having obtained title thereto by deed dated March 12, 1914. Many of the lots so sold were conveyed subject to restrictions that buildings erected thereon should set back a certain distance from the street line and that certain shops should not be erected nor maintained; but the restrictions were not uniform* in all the deeds in which they were created. It appears that nearly one half of all the lots upon the entire tract which have been sold before and since the sale of lot No. 3 to Randall in 1848 were sold without any restrictions whatever. Still we do not undertake to determine the status of any lot except lot No. 3. The nature and extent of restrictions to which other lots may be subject need not be decided. It is undoubtedly true, however, that a general scheme may be found to exist even if certain lots are sold

* *Jenney, J.*

† The description of this plan in the opinion gives all the information concerning it that is material.

without restrictions, or if the restrictions imposed are not identical. *Bacon v. Sandberg*, 179 Mass. 396. *Allen v. Barrett*, 213 Mass. 36, 39. *Hartt v. Rueter, ante*, 207.

It appears that in the conveyance to Randall, the defendant's predecessor in title, and in all subsequent deeds in the chain of title, including the deed to the defendant, no restrictions were imposed. There is nothing upon the plan which purports to restrict any of the lots shown thereon. In other words, there was nothing on the record in the registry of deeds to charge the defendant with notice that the lot, purchased by him, was subject to any restrictions whatever. Upon these facts, the defendant's lot cannot be held to be subject to any restrictions for the benefit of the lots owned by the plaintiff. *Beals v. Case*, 138 Mass. 138. *McCusker v. Goode*, 185 Mass. 607. *Roak v. Davis*, 194 Mass. 481. *Sprague v. Kimball*, 213 Mass. 380. It is well settled that an easement in the nature of an equitable restriction cannot be imposed upon land by parol. R. L. c. 127, § 3. *Sprague v. Kimball, supra*.

The plaintiff contends that the recital in a mortgage given by the defendant's predecessor in title, Randall, on November 5, 1850, while he was the owner of the rear portion of lot No. 3, is an acknowledgment by Randall of the existence of the restrictions, and "is sufficient not only to establish that he agreed to these restrictions when he purchased this lot, but that the omission of the same from his deed was due to accident or mistake," and that the principles stated in *Sprague v. Kimball, supra*, do not apply. If the deed to Randall omitted to refer to the restrictions and such omission was due to accident and mutual mistake, the remedy of the grantors or those claiming under them is by a bill to reform the deed, and cannot be considered in this proceeding. The Randall mortgage did not include the portion of lot No. 3 owned by the defendant, but covered only the rear part of that lot. The recital is as follows: "subject to those convenient restrictions heretofore imposed upon said land by deed of G. G. Hubbard et al., under whom I claim as by reference to the record thereof at said Registry will appear." Aside from the fact that the mortgage did not cover the part of lot No. 3 owned by the defendant, the recital was of a fact which never existed. Apparently Randall believed that the lot was subject to the restrictions, but it is plain that he was mistaken. No owner of the lot in ques-

tion ever has created any restriction upon it, and the recital in the mortgage of a fact which did not exist cannot create such restrictions.

It is unnecessary to consider whether the statute of frauds would be a bar to the relief which the plaintiff seeks.

As the suit cannot be maintained, the entry must be

Bill dismissed.

E. A. Whitman, (G. A. A. Pevey with him,) for the plaintiffs.

L. R. Eyges, for the defendant.

HORATIO G. PRATT & another, executors, vs. EVVIE F. DALBY
& others.

Norfolk. March 9, 1916. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, & CROSBY, JJ.

Will, Execution and attestation. Evidence, Presumptions and burden of proof.

An instrument purporting to be the last will of one who had been "an old fashioned country lawyer—a squire" accustomed to drawing wills and other instruments was wholly in the handwriting of the alleged testator and the date in the *in testimonium* clause had been changed in the testator's handwriting from a later date to that of the attestation clause. Two of the three persons named as witnesses had died before the instrument was presented for probate, and the surviving witness testified, "I do not remember seeing him [the alleged testator] sign it because I was not looking at him," and that when the instrument was presented to the witness for his signature it was folded and "all the part which he took any notice of was the part where he signed. He did not notice whether the signature of [the alleged testator] was there or not." It appeared that the alleged testator in the presence of the three witnesses stated that he wished the surviving witness "to witness his will; that probably it would be his last will," that the alleged testator and the witnesses sat down at a table, that the alleged testator "took out an instrument from an envelope which he had in his pocket," that "there were pen and ink upon the table," that "he had the pen and ink and document right there by the table before him," but that the surviving witness "was talking with [one of the other witnesses] and did not notice particularly what he was doing," that the three witnesses signed this paper in the presence of the alleged testator and of each other, that the paper was folded but that it was not so folded as to conceal from their view the signature of the testator if it was written thereon, and that, after the paper had been subscribed by the

witnesses, the alleged testator folded it and wrote something on the outside of it or on the envelope, and did not open it again. *Held*, that an inference was warranted that the will was executed by the testator in the presence of the three witnesses before it was subscribed by them and that its execution and attestation were complete and valid under R. L. c. 135, § 1.

CROSBY, J. This appeal from a decree of the Probate Court, allowing an instrument as the last will of Aaron Pratt, was heard by a single justice of this court.* All the evidence introduced before him was taken by a commissioner under Chancery Rule 35 and is reported. The single justice filed a memorandum of his findings and ordered that a decree be entered affirming the decree of the Probate Court. The respondents appealed.

The question presented is whether the will was duly signed, attested and subscribed in conformity with the requirements of R. L. c. 135, § 1. The respondents contend that there is no evidence to show that the testator signed the will before it was attested and subscribed by the witnesses. Two of the subscribing witnesses, Damon and Stockbridge, have died, one of them before the death of the testator and the other after the testator's death but before any hearing was held upon the allowance of the will. The surviving subscribing witness, Charles J. Hackett, testified at the hearing before the single justice: "I do not remember seeing him sign it because I was not looking at him." The evidence showed that, when the instrument was presented to Hackett for his signature, it was folded, and he testified that "all the part which he took any notice of was the part where he signed. He did not notice whether the signature of Pratt was there or not."

The undisputed evidence shows that when this witness went to the home of one Damon, one of the other witnesses to the will, the testator, in the presence of the three witnesses, stated that he wished Hackett "to witness his will; that probably it would be his last will;" that the testator and the witnesses sat down at the table; that the testator "took out an instrument from an envelope which he had in his pocket;" that "there were pen and ink upon the table." The entire instrument, including the signature, was in the handwriting of the testator except the signatures of the witnesses. There was evidence to show, and the single justice found, that the business of the testator was that of "an old fashioned

* *Pierce, J.*

country lawyer — a squire.” He was not a member of the bar, but drafted conveyances, drew deeds and administered estates.

While there was evidence that when the instrument was subscribed by the witnesses it was folded, the single justice found that it was not so folded as to conceal from their view the signature of the testator if it was written thereon. *Nunn v. Ehlert*, 218 Mass. 471. It is not disputed that all the witnesses subscribed the instrument in the presence of the testator and in the presence of each other.

The witness Hackett testified that, after the will had been subscribed by the witnesses, the testator folded it up and wrote something either on the outside of it or on the envelope and did not open it again. An inspection of the original instrument showed that the date in the *in testimonium* clause had originally been written “May 25” and was changed to “May 19.” The date in the attestation clause is “May 19.”

While there was no direct evidence to show that the testator signed the instrument in the presence of the witnesses, there was evidence that he requested Hackett in the presence of the other witnesses “to witness his will,” and Hackett testified “he had the pen and ink and document right there by the table before him. I was talking with Damon and did not notice particularly what he was doing.”

The evidence that the testator’s business was that of drafting wills and other legal instruments might be found to indicate that he was familiar with the legal requirements relating to the due execution thereof. The evidence of the change in the date in the *in testimonium* clause indicated that the date was changed to make it conform to the date in the attestation clause and the date when the instrument actually was subscribed by the witnesses. These facts, together with the other evidence in the case, warrant the inference that the will was executed by the testator in the presence of the witnesses and before it was subscribed by them. The finding that his signature was not concealed from the witnesses at the time the will was attested and subscribed by them was also warranted. *Hall v. Hall*, 17 Pick. 373, 375. *Dewey v. Dewey*, 1 Met. 349. *Chase v. Kittredge*, 11 Allen, 49. *Meads v. Earle*, 205 Mass. 553.

The conclusion which we have reached is not at variance with

the case of *Nunn v. Ehlert, supra*, cited and relied on by the respondents, but is in conformity with the principles there stated. We think, in view of the findings of the single justice which were warranted by the evidence, that the will was attested and subscribed in accordance with the meaning of those terms as defined in the opinion in that case.

Decree affirmed.

M. Coggan, (A. W. Eldredge with him,) for the respondents.

A. F. Barker, for the petitioners.



THOMAS HOWARD & another vs. HARVARD CONGREGATIONAL SOCIETY & trustee.

Suffolk. March 9, 1916. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Contract, Construction, Building contracts.

In a building contract the contractor under the specifications relating to "Excavations" agreed to "remove all soil, earth and stones" from a designated area to a specified depth, and the owner agreed "to provide all labor and materials essential to the conduct of this work not included in this contract." When the cellar had been partly dug, a ledge of solid rock was discovered which it was necessary to remove in order to continue the work, and this ledge was removed by the contractor with the knowledge of the owner. In an action by the contractor against the owner to recover for the removal of this ledge as extra work outside the contract, it was *held*, that the material to be excavated by the contractor, which was limited to "soil, earth and stones," did not include the ledge of rock, the removal of which was the duty of the owner under the terms of the contract. In the action above described it appeared that the contract between the plaintiff and the defendant provided that "No alterations shall be made in the work except upon the written order of the Architect; the amount to be paid by the Owner or allowed by the Contractors by virtue of such alterations to be stated in said order," and that the architect, although he orally had approved the excavation of the ledge as an extra, had given no written order for it. *Held*, that the excavation of the unforeseen ledge of rock could not be considered an alteration in the work, being a matter wholly outside the scope of the specifications of the contract, so that the provision above quoted did not apply to it and

there was no reason why the plaintiff should not recover compensation for the extra work thus done by him.

In the same action it was *held*, that it was immaterial that the defendant understood and supposed that the work of removing the ledge was done by the plaintiff as a part of the contract, the defendant as matter of law being bound to know and abide by the terms of the contract it had made.

CROSBY, J. This is an action brought to recover a balance which the plaintiffs claim to be due upon a building contract, and presents the question, whether the removal from the cellar of a ledge of rock which was not discovered until the cellar had been partly excavated was required to be done by the plaintiffs under the specifications, which are a part of the contract.

The specifications, so far as material to this question, provide as follows:

“Excavations

“Remove all soil, earth and stones from an area about 64' 0" × 66' 0" to a depth of 10' — 6" below top of present old underpinning, to form a basement. Also excavate trenches for drain to sewer in street, for a trench under piers and foundation walls; also for stairs and window areas; also for heater room and lavatories. Excavate yard about edifice to a depth of 4' — 6" below top of present underpinning adjacent to new building.

“Retain sufficient quantity of the loam and grade about new building 6" deep.

“Remove all other excavations from the premises.

“Level cellar bottom ready for concrete.”

It is to be noted that the material to be excavated by the contractors is limited to “soil, earth and stones.” These words, as used in this contract, do not include a ledge of solid rock. The minute reference to “soil, earth and stones,” words which have a somewhat definite significance in common understanding, excludes the large mass or ridge of rock usually referred to as ledge.

Under Article VIII of the contract, it is provided in part as follows: “The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractors, agrees that it will reimburse the Contractors for such loss.” The removal

of the ledge, made necessary in excavating for the cellar, was a labor that the defendant was required to perform under Article VIII.

It is agreed by the parties that "The plaintiffs upon the discovery of the ledge called it to the attention of the architect and claim that he thereupon decided the work of excavating the ledge was not included in the contract. If the architect made the said decision, it is admitted that he communicated such decision to the plaintiffs and directed performance of said work by the plaintiffs as an extra, but neither the architects nor the plaintiffs ever communicated to the defendant or any one acting for it such decision of the architect that the excavation of the ledge was not included in the contract, or that the plaintiffs claimed extra compensation for such excavation of the ledge until the presentation of their bill after the completion of the work."

It is further agreed that, whatever the architect did in the premises, he acted in good faith, and that no written order for the excavation of the ledge was given by him.

The jury found, in answer to questions submitted to them, that the plaintiffs did not have knowledge of the existence of the ledge at the time of the making of the contract; that they could have discovered its existence at that time by a reasonable examination of the premises; and that the architect decided that the excavation of the ledge was an extra which the plaintiffs were not required by the contract to perform.

It is also agreed "that at the time of the removal of the ledge, the defendant had actual knowledge that the same was being excavated by the plaintiffs, and although the members of the building committee of the defendant and the plaintiffs talked together at various times during the excavation, nothing was said by either party to the other concerning the excavation being an extra to the contract."

In view of the conclusion which we have reached as to the construction of the specifications relative to excavations, it follows that the architect was right in his determination that the removal of the ledge was not a part of the work which the plaintiffs were required to perform.

If the plaintiffs had been required, under the contract, to excavate for the cellar without reference to any particular kind of material that might appear under the surface of the earth in making

the excavation, then the principle stated in *Braney v. Millbury*, 167 Mass. 16, and in *Stuart v. Cambridge*, 125 Mass. 102, would apply.

The clause in the specifications that the contractors are to "Remove all other excavations from the premises" has no application to excavating the ledge, but relates to the removal of materials that have already been excavated.

As the plaintiffs removed the ledge, and as it involved labor which the defendant was obliged to perform or to furnish, the question remains whether the plaintiffs are entitled to recover therefor. The defendant contends that it is not liable, as no written order was given by the architect to the plaintiffs as required by Article III. This article stipulates, that "No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractors by virtue of such alterations to be stated in said order."

The removal of the ledge cannot be considered as an "alteration" in the work under Article III. This work was not originally contemplated by the parties but is to be treated as work wholly extra and entirely outside the scope of the contract, and so Article III is not applicable to this claim of the plaintiffs. *Casey v. McFarlane Brothers Co.* 83 Conn. 442. *Mahoney v. Hartford Investment Corp.* 82 Conn. 280.

If it be assumed, that the defendant understood that the work of removing the ledge was done by the plaintiffs under, and as part of, the contract, still it was bound as a matter of law to know the terms of the contract which it had entered into, and so is charged with knowledge that the plaintiffs were not required to excavate the ledge. *Norcross v. Wyman*, 187 Mass. 25. It is agreed that at the time the work was performed, the defendant had actual knowledge that the plaintiffs had removed the ledge, and that it assented thereto, and has received the benefits accruing therefrom.

From all these facts and the legitimate inferences therefrom, the judge of the Superior Court * was warranted in finding that the plaintiffs were entitled to recover for the extra work of removing the ledge. *Reid v. Miller*, 205 Mass. 80. *Boston v. Amadon*, 172 Mass. 84. *Westgate v. Munroe*, 100 Mass. 227.

* *Lawton, J.*

In accordance with the terms of the report, judgment is to be entered for the plaintiffs in the sum of \$1,306.87, with interest from December 29, 1911, together with the taxable costs.

So ordered.

T. C. Bachelder, for the defendant.

P. W. Carver, for the plaintiffs.

ALMER H. WALKER vs. ALVAN T. FULLER.

Suffolk. March 10, 1916. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & PIERCE, JJ.

Negligence, Invited person, Trespasser. Automobile.

Where the agent of a manufacturer of automobiles, maintaining an automobile station in Boston, had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, and where one of such chauffeurs when driving a customer's car was asked by a fellow employee, whose work for the day was done and who was waiting to take a street car, whether he was going in town, to which the chauffeur replied that he was, whereupon his fellow employee got into the automobile and sat in the rear seat, the chauffeur knowing "that he took chances of losing his job if he gave anybody a ride," and thereupon the chauffeur proceeded on his way in the automobile and a collision occurred in which the fellow employee was injured, in an action for such injuries brought by him against his employer, it was *held*, that there was no evidence that the plaintiff was being carried in the automobile by invitation of the defendant and that accordingly the plaintiff was in the position of a trespasser to whom the defendant owed no duty of care.

CROSBY, J. This is an action of tort against the agent of the Packard Motor Car Company of Boston to recover for personal injuries received by the plaintiff while being carried in an automobile operated by one Woods, an employee of the defendant. The automobile was owned by one Percival, a customer of the defendant.

The plaintiff, who was also in the defendant's employ at the latter's automobile station, finished his work at about five o'clock on the afternoon of the day of the accident, and while waiting to take a street car, saw Woods as he drove out of the defendant's

yard. The plaintiff asked Woods if he was going in town and the latter replied that he was, whereupon the plaintiff got into the automobile and sat in the rear seat. As the machine was proceeding along Commonwealth Avenue on the right side, it came into collision with another automobile and the plaintiff received the injuries for which he seeks to recover in this action.

It is conceded that the plaintiff had finished his work for the day before he entered the automobile, and the first question is whether as to the defendant he was an invitee or a trespasser.

Woods, the chauffeur, who was called as a witness by the plaintiff, testified that there was a rule established by the defendant prohibiting chauffeurs "giving rides to other employees in the cars they were driving; that they were not to give any of the employees rides in any of the customers' cars or the owners; that they were not supposed to give any of the employees rides in those cars; that the order was given to them by Mr. Grant, their foreman, and he received it from Mr. Sheldon; that this instruction was given to him at the time he entered their employ; that he did not ordinarily obey the order; that when Mr. Walker was riding in the car down Commonwealth Avenue, he (the witness) knew that it was in direct violation of the rules of the company; that he picked him up outside of the factory at about half past five; that he was taking chances in violating the rules of the company in that way; that he took chances of losing his job if he gave anybody a ride; that he knew that was the penalty; that he knew men had been discharged for violating that rule."

The testimony of Woods was uncontradicted, although there was evidence that on different occasions the rule had been violated; but there was no evidence to show that the defendant knew of such violations.

At the time of the accident the plaintiff was on his way home, and for his own convenience was in the automobile without the knowledge or consent of the defendant. The invitation of the defendant's employee Woods was not an invitation of the defendant. *McManus v. Thing*, 194 Mass. 362.

While there was evidence from which it could be found that the rule was occasionally violated, it falls far short of justifying a finding that such violation was so frequent, continual and notorious as to show that the rule was no longer in force and had been aban-

doned, as was held in *Sweetland v. Lynn & Boston Railroad*, 177 Mass. 574, *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, *Feneff v. Boston & Maine Railroad*, 196 Mass. 575, *Leitchworth v. Boston & Maine Railroad*, 220 Mass. 560.

The plaintiff was not being carried in the automobile at the time he was injured by reason of any invitation of the defendant or of anyone in his employ who was authorized by him to extend such an invitation. It is plain therefore that he was a trespasser and cannot recover. *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225. *Galligan v. Metacomet Manuf. Co.* 143 Mass. 527. *Shea v. Gurney*, 163 Mass. 184. *Driscoll v. Scanlon*, 165 Mass. 348. *Bowler v. Pacific Mills*, 200 Mass. 364. *Hillman v. Boston Elevated Railway*, 207 Mass. 478.

As there was no evidence to justify a finding that the plaintiff was in the automobile by invitation of the defendant, the questions whether there was evidence that the plaintiff was in the exercise of due care and that the defendant was negligent were immaterial.

In accordance with the terms of the report,* let the entry be
Judgment for the defendant.

J. D. Graham, for the plaintiff.

F. B. Kendall, for the defendant.

HANNAH T. MCCARTHY vs. BOSTON ELEVATED RAILWAY
 COMPANY.

MICHAEL J. MCCARTHY vs. SAME.

Middlesex. March 15, 1916. — April 17, 1916.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Negligence, Street railway, Mental suffering. *Practice, Civil*, Rulings and instructions. *Pleading, Civil*, Declaration. *Damages*, Special.

In an action by a woman, against a corporation operating street and elevated railways, for personal injuries alleged to have been sustained by reason of a car of the defendant running into the rear of another car of the defendant in which the

* By *Fessenden, J.*, who ordered a verdict for the defendant Fuller and reported the case for determination by this court.

plaintiff was a passenger, there was evidence that as a result of the collision all the passengers in the car in which the plaintiff was were thrown to the floor, that afterwards a man was seen putting the plaintiff back upon a seat of the car, that she was carried out of the car to her home and was in a condition of collapse and unable to walk, that on the day of the accident or the next day the plaintiff's husband "saw a mark on his wife's right hip and right elbow that appeared to be a bruise," that the physician who attended her on the day of the accident when he first examined her diagnosed her case as an injury to the back, "that he thought there was a little redness at the time" although there were no abrasions or black and blue spots. *Held*, that this evidence warranted a finding that the injuries received by the plaintiff were not wholly mental, but were physical injuries for which she was entitled to recover damages together with damages for mental suffering that arose out of or accompanied such physical injuries.

At the trial of an action by a woman for personal injuries, where it appears that, before the accident which caused her injuries, the plaintiff was a strong, healthy, robust woman about twenty-seven years of age, and there is nothing to indicate that she was "a person of peculiar sensitiveness," it is proper for the presiding judge to refuse to give an instruction to the jury as to its not being the duty of the defendant to anticipate an injurious result which would happen only to a person of peculiar sensitiveness, irrespective of the question whether the ruling requested would be a correct one if it were applicable to the facts of the case.

In an action against a corporation operating street and elevated railways for personal injuries sustained by reason of an accident, which caused mental suffering as well as some physical injury, a general averment of damages in the declaration is sufficient to cover the proof of physical and mental suffering of the plaintiff based upon permanent injury, a claim for permanent injury not being a matter of special damage.

In the action mentioned above there was evidence that the plaintiff after the accident had suffered from hysteria which had continued down to the time of the trial, that as a result of this condition she had been in a state of unconsciousness on different occasions and had been confined to her bed most of the time, and her family physician testified that her ultimate recovery was problematical and unlikely. There was other medical testimony to the effect that in some cases of hysteria the persons so suffering became chronic invalids and that it could not be determined when, if ever, the plaintiff would recover. *Held*, that there was evidence warranting a finding that the plaintiff was injured permanently.

TWO ACTIONS OF TORT, the first for personal injuries sustained by the plaintiff on July 3, 1914, when she was a passenger in a car of the defendant, by reason of the car being run into from behind by another car of the defendant at the defendant's station at Sullivan Square in the part of Boston called Charlestown, and the second action by the husband of the plaintiff in the first action for damages incurred by reason of her injuries. Writs dated respectively September 21, 1914, and November 11, 1914.

In the Superior Court the cases were tried together before

Hardy, J. The admissions of the defendant and the evidence are described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. There is no sufficient evidence that in consequence of the collision of cars the plaintiff suffered any physical injury.

"3. There is no sufficient evidence of direct injury to the plaintiff from without, arising from the collision of cars, to enable the plaintiff to recover.

"4. There is no sufficient evidence of a substantial battery to the person of the plaintiff to entitle her to recover."

"7. The defendant is not bound to anticipate or guard against an injurious result which would happen only to a person of peculiar sensitiveness.

"8. There is no sufficient averment in the declaration to entitle the plaintiff to recover damages on the theory that she is permanently injured.

"9. There is no sufficient evidence warranting a finding that the plaintiff is permanently injured."

"12. If, under the instructions of the court, the jury find that there were such physical injuries in this case as to permit the recovery of damages, then, in determining the damages to be awarded the jury must eliminate from consideration such of the plaintiff's symptoms, or demonstrations, if any, as could have been prevented by the exercise of such self control as the plaintiff was capable of at the time of such symptoms or demonstrations.

"13. If the jury believe that the plaintiff has had fits, spasms, or spells since the accident, and if the jury also believe that the coming on of such fits, spasms or spells was always, or sometimes, under the plaintiff's control in the sense that she could by the exercise of the will power or self control of which she was capable have always, or sometimes, prevented them from happening, had she wished to do so, then, so far as that was the case, she cannot recover for fits, spasms, or spells, so preventable or for their consequences."

The judge refused to make these rulings, although the twelfth and thirteenth are held to have been covered substantially by the charge.

The charge of the judge contained the following portions:

"Now, the burden on the plaintiff is to satisfy you by a fair preponderance of the evidence that she sustained a certain injury to such extent whereby she claims compensation; as to the character of that injury, whether temporary or permanent. And that burden must outweigh the burden of the evidence of the defendant. She must show her case by a fair preponderance of evidence. It does not mean that she must introduce more witnesses than the defendant introduces. In that respect you have to use good judgment, your common sense, you have to weigh the evidence, the quality of it and say whether you draw the same conclusions that the witnesses do here about the actual situation in the case."

"Now, in this particular case, supposing this plaintiff in this collision received only a sense of fright; supposing she remained in her seat where she was sitting and there was no physical injury imposed on her body and the only thing that she suffered from was the mental shock, the nervous shock as the result of fear, then she would not be entitled to recover. You must be satisfied on all the evidence that there was some physical injury imposed upon her. It may be slight — only a slight injury. You have evidence that she was thrown down in the car and she suffered some marks of physical injury found by the doctor, and it is for you to say that that occurred. If you are so satisfied, then you may take into consideration any mental shock imposed by some fear of physical violence — imposed on the body."

"The company is only liable for those consequences which can be traced to failure of duty by the company as the proximate cause. What do you find? It is claimed by the plaintiff that you ought to find that she received an injury to the extent that can be traced to this as the proximate cause; that these injuries will continue in future, and you are to weigh that and say whether you are satisfied of that."

"Now, there is some issue here as to the nature and character of the injury. Is it temporary or permanent in its character? That of course, is a question of fact and you have the opinions of experts, the opinions of men who have had some experience in this sort of thing and they tell you what they believe. It is for you to say how far their opinions founded on the evidence help you in forming yours. You are here to give the final opinion and so far

as you find that the evidence shows that it is temporary or permanent in its nature, so far you will be under obligation to give her fair and reasonable compensation."

The jury returned a verdict for the plaintiff in the first case in the sum of \$10,000 and a verdict for the plaintiff in the second case in the sum of \$1,000. The defendant alleged exceptions.

F. J. Carney, for the defendant.

A. J. Daly, for the plaintiffs.

CROSBY, J. The plaintiff in the first action, a passenger, seeks to recover for personal injuries, alleged to have been received in a collision of the defendant's cars. The second action is brought by the husband of the plaintiff in the first action, for consequential damages.

The plaintiff in the first action hereafter will be referred to as the plaintiff.

At the trial of these cases in the Superior Court it was admitted that the collision was due to negligence on the part of the defendant and that the plaintiff was in the exercise of due care.

1. It is undoubtedly true that there can be no recovery for personal injuries in cases of this kind, where the only result of the injury is fright or mental distress unaccompanied by some physical injury to the person from without. *Spade v. Lynn & Boston Railroad*, 168 Mass. 285. *Cameron v. New England Telephone & Telegraph Co.* 182 Mass. 310. *Steverman v. Boston Elevated Railway*, 205 Mass. 508. *Conley v. United Drug Co.* 218 Mass. 238. *Megathlin v. Boston Elevated Railway*, 220 Mass. 558.

The collision was caused by a car of the defendant running into the rear end of the car in which the plaintiff was a passenger. There was evidence that as a result of the collision all the passengers were thrown to the floor; that afterwards a man was seen putting the plaintiff back upon the seat of the car; that she was carried out of the car and to her home, and that she was in a condition of collapse and unable to walk; that on the day of the accident or the next day, the plaintiff's husband "saw a mark on his wife's right hip and right elbow that appeared to be a bruise." The physician who attended her on the day of the accident testified that when he first examined her he diagnosed her case as an injury to the back; "that he thought there was a little redness at the time" although there were no abrasions or black and blue

spots. This evidence, if believed, would justify a finding that the injuries which the plaintiff received were not wholly mental but were also of a physical character for which she was entitled to recover, together with the mental suffering which arose out of or accompanied such physical injuries.

If a person meets with such an accident as happened to the plaintiff, and shortly afterwards marks and bruises are found upon the body, we think it is a reasonable inference that such marks and bruises were caused by the accident and that it could not be ruled that the cause thereof was speculative or conjectural; accordingly, the defendant's first, second, third and fourth requests could not have been given.

2. There was evidence to show that before the accident the plaintiff was a strong, healthy, robust woman about twenty-seven years of age. There was no evidence to show that she was "a person of peculiar sensitiveness," and therefore, the defendant's seventh request was not applicable. We do not mean to intimate that the ruling is sound.

3. The averment of damages in the declaration is general, and where there are averments that show a liability, this is sufficient unless special damages are sought to be recovered. As was said by this court in *Sherlag v. Kelley*, 200 Mass. 232, at page 236, "The forms of pleading previously used in this Commonwealth are authorized by the R. L. c. 173, § 130. In Pub. Sts. c. 167, § 94, under the forms of declarations in actions of tort, is this language: 'The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed.'" The declaration alleges that "while a passenger, as aforesaid, she was injured by reason of the negligence of its (the defendants) servants and agents in operating, managing and controlling said car. Wherefore the plaintiff claims damage." Under this averment the plaintiff was entitled to recover for such damages as were the natural and necessary result of the defendant's negligence. Whatever may be the rule elsewhere, we think that in this Commonwealth the jury were authorized to consider as elements of damage the physical and mental suffering of the plaintiff based upon permanent injury, if proved to be of that character. We do not think that a claim for permanent injury can be regarded as special damages and so the defendant's eighth request was re-

fused properly. *Millmore v. Boston Elevated Railway*, 198 Mass. 370. *Sherlag v. Kelley*, *supra*. *Emery v. Lowell*, 109 Mass. 197.

4. The evidence shows that the plaintiff, since the accident, has suffered from hysteria which has continued down to the time of the trial; that as a result of her condition she has been in a state of unconsciousness on different occasions, and has been confined to her bed most of the time. Her family physician who attended her testified that "he thought the future of the plaintiff as to ultimate recovery was very problematical; that he was led to that assumption because the woman had been sick for a year and a half; that she was in a miserable condition; stiffness in one leg; lack of sensation in the other; . . . that she did not use both legs at all well and only in a limited way; that she had a paralyzed arm, a stiffness and inability to use it; that she was a nervous and he might say a physical wreck . . . that he would not want to predict about her future recovery but he thought she would never be the woman she was before, but that he could not absolutely say that she had any organic disease, but the trouble has lasted so long that there must be some profound change in her nervous organism . . . some profound change of which I do not know anything, and yet it seems it is something that we do not think she is going to recover from." There was other medical testimony to the effect that in some cases of hysteria the persons so suffering became chronic invalids and that it could not be determined when, if ever, the plaintiff would recover.

On the other hand, there was evidence that the plaintiff's disease was wholly mental and that she was not suffering from any permanent injury.

Upon this conflicting evidence the jury could have found that the plaintiff's injury was permanent and that damages might be assessed accordingly.

5. The defendant's twelfth and thirteenth requests were substantially covered by the charge. The instructions given by the presiding judge correctly stated the principles of law applicable to the issues presented which were elucidated by apt illustrations.

As we are unable to discover any error in the conduct of the trial, in each case the entry must be

Exceptions overruled.

GEORGE F. BRADLEY & others vs. FREDERICK W. BORDEN & others.

Suffolk. January 19, 20, 1916. — April 21, 1916.

Present: RUGG, C. J., BRALEY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Reference to master, Motion to recommit, Premature suit. *Voluntary Association. Syndicate. Contract, Construction, Consideration. Equity Jurisdiction*, For an accounting.

Where a suit in equity is referred to a master with an order to report his findings of fact and rulings of law, his report of rulings of law is advisory.

Where by consent of the parties a suit in equity is referred to a master "to hear the parties and their evidence, to find the facts, decide the case, and report thereon to the court," the master has authority to report not only his findings of fact but also his rulings of law.

Where a suit in equity was referred to a master under the rule quoted above, and the master stated in his report, "The scope of the rule has been questioned by the parties, and I have interpreted the same to direct me to determine matters of law as well as matters of fact, and to make such findings as would have been made by a justice of this court had the case been heard by the court," and where a motion to recommit the report to the master was denied by the single justice who heard the case, it was *held*, that, although the statement of the master was not strictly accurate, yet, when limited to its meaning in connection with other parts of the rule, it was essentially correct, and that at any rate the objecting party was not harmed by it, so that the denial of the motion to recommit was right whether considered as a matter of discretion or as a matter of law.

Where a voluntary association, called a syndicate, was formed by an agreement between the subscribers and a governing board, called the syndicate managers, and the purpose of the syndicate was declared in the agreement to be the acquiring through a contract held by a certain corporation of fifty-two per cent of the capital stock of a certain copper company, "also for the purpose of purchasing remaining stock of said [copper company]; of providing additional working capital for continuing and developing the business of said [copper company] and of developing the property owned and controlled by said company, or which may be at any time acquired by it," it was *held*, that the words "remaining stock" as used above meant remaining outstanding stock.

By the syndicate agreement named above it was provided that "The syndicate managers shall have the sole direction and management and the entire conduct of the transaction and business of the syndicate; they are authorized to vote and act in respect of all stocks held by it, and to do any and all things by them in their sole and absolute discretion deemed proper, necessary or expedient to carry out the purposes of this agreement." Under this and other clauses of the agreement, it was *held*, that the syndicate managers had authority to employ a certain expert and pay him for information valuable and necessary for a complete understanding of the business of the copper company.

It also was *held* that the syndicate managers had no authority to set aside certain shares of stock to be delivered to certain persons as a reward for faithful past services, such recognition of a moral obligation not being within the "purposes" of the agreement.

It also was *held* that the syndicate managers had no authority to grant an option to purchase certain shares of stock to another person in consideration of present service and future service to be rendered, the "present" service having been rendered voluntarily and the grantee of the option being under no binding agreement to render any service in the future.

The syndicate agreement above described contained the following provision in regard to the termination of the syndicate: "Unless the object of the syndicate shall be sooner attained as determined by the syndicate managers in their discretion, the syndicate shall remain in force for a period of three years from the date hereof. . . . Thereupon the affairs of the syndicate shall be wound up by the syndicate managers and the net proceeds in cash or securities, including all dividends and interest received, shall be distributed *pro rata* among the subscribers not in default." In the last of the three years thus provided for the existence of the syndicate, the syndicate managers by proper votes and by acts in pursuance of them, under circumstances which made such action necessary for the purposes of the syndicate agreement, caused to be issued by the copper company \$150,000 of its income bonds and issued, as a bonus distributed *pro rata* to the purchasers of these bonds, twenty thousand, five hundred shares of stock of the copper company, placing the remainder of the stock of that company owned by the syndicate in a voting trust for a period of three years or until such time as the income bonds should be redeemed by the copper company. *Held*, that these acts, performed by the syndicate managers in good faith, were a proper exercise of "their sole and absolute discretion," there being no provision in the syndicate agreement that, when the affairs of the syndicate should be wound up by the syndicate managers at the end of the three years, there should be any distribution of the shares of stock of the copper company *in specie* to the subscribers.

Three days after the expiration of the term of three years provided for in the syndicate agreement above described, certain subscribers to the syndicate filed a bill in equity against the syndicate managers, praying for a winding up of the syndicate and the distribution of its property among the subscribers. A master to whom the case was referred found "that a reasonable time for winding up the affairs of the syndicate, after the time when it terminated by the terms of the agreement, was one month after" the day of termination. *Held*, that the suit was brought prematurely, as the defendants at the time it was brought were under no obligation to account to the plaintiffs.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 23, 1912, by subscribers under a certain agreement dated October 20, 1909, called the "Syndicate Agreement," against certain persons called the "Syndicate Managers," who were the parties of the first part in such syndicate agreement, and the Butte Central Copper Company, a corporation organized under the laws of the State of Delaware, having a usual place of business in Boston

and owning and operating certain mining properties in the State of Montana, also against the First National Bank of Boston, a United States corporation having its principal place of business in Boston, and the Federal Trust Company, a corporation organized under the laws of this Commonwealth and having its usual place of business in Boston, alleging that the term of existence of the syndicate agreement expired on October 20, 1912, and that the plaintiffs were entitled to have the affairs of the syndicate wound up and to an accounting by the syndicate managers for their administration of the property of the syndicate and to the distribution of the shares of stock and other property of the syndicate among the plaintiffs and others who were the subscribers and the parties of the second part under the syndicate agreement; and that the defendant syndicate managers, regardless of their fiduciary relation to the plaintiffs and others, had mismanaged the property of the syndicate and wrongfully had disposed of a part of it as more particularly set forth in the bill. The prayers of the bill were, (1) that the defendant Federal Trust Company be restrained until further order of the court from taking any action under an agreement or contract made between it and the defendant syndicate managers, (2) that the defendant First National Bank be restrained until further order of the court from disposing by transfer or otherwise of the whole or any part of the shares of stock of the Butte Central Copper Company held or controlled by it and originally delivered to it in accordance with the syndicate agreement, (3) that the defendant Butte Central Copper Company be restrained until further order of the court from permitting any transfer of the shares of its capital stock which were purchased from it by Sir Frederick W. Borden and others under or in connection with the syndicate agreement and another agreement of January 7, 1910, (4) that the other defendants be restrained until further order of the court as individuals and as syndicate managers and parties of the first part to the syndicate agreement from selling or otherwise disposing of any shares of stock or other property belonging to the parties of the second part under that agreement, (5) for a temporary receiver of the property, moneys and effects belonging to the parties to the syndicate agreement, (6) for a permanent receiver of such property, (7) for further relief and (8) for further relief against the defend-

ants Butte Central Copper Company, First National Bank of Boston and Federal Trust Company either jointly or severally.

Lemuel E. Demelman, one of the defendants to the original bill, filed a cross bill by leave of court on July 25, 1913, praying that he might be granted the same relief granted to the plaintiffs in the original bill and for an accounting between him and the other defendants named in the original bill. Later, upon the suggestion of the death of Demelman, motions were granted making the executors of his will defendants to the original bill and plaintiffs in the cross bill.

Adolph Leve, another of the defendants to the original bill, also filed a cross bill by leave of court on July 25, 1913, praying for like relief.

The reference of the case to a master is described in the opinion. The denial of the motion to recommit the master's report there mentioned was by *Crosby, J.*

The syndicate agreement as stated in the master's report was as follows, the numbers of the paragraphs having been added by the master for convenience of reference:

"[1] AGREEMENT dated the twentieth day of October, 1909, by and between SIR FREDERICK W. BORDEN, LESLIE S. MACOUN, MARK WORKMAN, ALFRED R. TURNER, CHARLES A. HENDERSON, FREDERICK J. BOWLES, FREEMAN I. DAVISON, WILLARD E. ROBINSON, WILLIAM H. NORTH, LEMUEL E. DEMELMAN, herein-after called the 'Syndicate Managers,' parties of the first part, and THE SUBSCRIBERS HERETO, severally, parties of the second part (of whom each is hereinafter termed a 'Subscriber'), and all of whom, together with the said parties of the first part, constitute the Syndicate.

"[2] WHEREAS, The International Underwriting Company holds a contract for the purchase of 52 per cent. of the capital stock of the Butte Central Copper Company, a corporation duly created and existing under the laws of the State of Delaware; and

"[3] WHEREAS, the parties of the first and second parts hereto desire to form a Syndicate for the purpose of acquiring from said International Underwriting Company their rights under said contract for the purchase of the stock aforesaid; and also for the purpose of purchasing remaining stock of said Butte Central Copper Company; of providing additional working capital for con-

tinuing and developing the business of said Butte Central Copper Company and of developing the property owned and controlled by said Company, or which may be at any time acquired by it;

"[4] NOW, THIS AGREEMENT WITNESSETH: That in consideration of the premises and of the mutual promises herein contained, the parties hereto agree, and the Subscribers severally agree with each other and with the Syndicate Managers, as follows:

"[5] The parties aforesaid hereby form a Syndicate for the purpose herein expressed, and with a maximum capital of Two Hundred Thousand Dollars (\$200,000.00), and the Subscribers severally subscribe to the said capital the sum written opposite their names, respectively, at the foot of this agreement, and each for himself hereby promises and agrees to and with the others and each of them, and to and with the Syndicate Managers, and their successors and assigns, to pay the said sum so subscribed, on call of the Syndicate Managers, to the First National Bank at its office in the City of Boston, or such other depository as the Syndicate Managers may designate as Depository, for account and subject to the order of the Syndicate Managers.

"[6] Payment of subscriptions shall be made as follows: 25 per cent upon call, and the balance when and as called by the Syndicate Managers.

"[7] Each Subscriber shall be entitled to receive for all payments made hereunder when and as called by said Syndicate Managers a suitable receipt or certificate entitling the Subscriber (not being in default hereunder) to participate *pro rata* in the benefits of the Syndicate hereby formed and to receive securities or cash when the Syndicate Managers shall be able or shall determine to distribute or deliver the same.

"[8] Each Subscriber shall be liable solely to the Syndicate Managers, and their successors and assigns, and only to the extent of his individual participation in the Syndicate and the amount subscribed hereto; nothing contained in this agreement or otherwise shall constitute the Subscribers partners with or agents for one another, or with or for the Syndicate Managers, or render them liable to contribute in any event more than their individual subscription.

"[9] All moneys paid hereunder shall be used by the Syndicate Managers for the aforesaid plan, including the payment of all charges

and expenses connected therewith, but the Depository shall not be under any liability in respect to the application of such moneys.

"[10] Unless the object of the Syndicate shall be sooner attained as determined by the Syndicate Managers in their discretion, the Syndicate shall remain in force for a period of three years from the date hereof. It may be terminated by the Syndicate Managers in their discretion at any time, and upon request of at least two-thirds in interest of the Subscribers it shall be terminated upon sixty days' written notice to the Syndicate Managers. Thereupon the affairs of the Syndicate shall be wound up by the Syndicate Managers and the net proceeds in cash or securities, including all dividends and interest received, shall be distributed *pro rata* among the Subscribers not in default. This agreement shall bind and benefit ratably, according to the amount of their respective subscriptions, not only the parties hereto, but their respective successors, assigns or personal representatives.

"[11] The Syndicate Managers shall have the sole direction and management and the entire conduct of the transaction and business of the Syndicate; they are authorized to vote and act in respect of all stocks held by it, and to do any and all things by them in their sole and absolute discretion deemed proper, necessary or expedient to carry out the purposes of this agreement.

"[12] Each Subscriber hereby ratifies, assents to and agrees to be bound by any action of the Syndicate Managers taken under this agreement, and agrees to perform his undertakings hereunder from time to time promptly on call of the Syndicate Managers, to the full extent of the amount set opposite his signature hereto; but in no event and under no circumstances in excess thereof. The failure of any Subscriber to perform any of his undertakings hereunder shall not affect or release any other Subscriber. In case of the failure of any Subscriber to perform any of his undertakings hereunder, the Syndicate Managers may allow other persons or corporations to take the share of participation of the Subscriber so failing to perform his undertakings.

"[13] Upon the failure of any Subscriber to perform any of his undertakings hereunder, the Syndicate Managers shall have the right at their option and in their discretion to exclude such Subscriber from further interest and participation in the Syndicate, and to forfeit any payments he may have theretofore

made hereunder, and to hold him liable for and recover all damages caused to the Syndicate by his failure to perform.

"[14] It is understood and agreed that the Syndicate Managers shall not be liable under any of the provisions of this agreement, nor in, nor for any matter or thing connected therewith, except for their individual want of good faith or wilful negligence.

"[15] It is understood and agreed that the Syndicate Managers may act by a majority of their number and may appoint officers, who shall be authorized by resolution of the Syndicate Managers to draw against the funds to the credit of the Syndicate Managers with the Depository, and that they may associate with themselves additional Syndicate Managers; provided, however, that not more than fifteen (15) Syndicate Managers in all shall be appointed. Additional Syndicate Managers so appointed shall have all the powers and obligations of the Managers originally named. No action shall be taken by said Syndicate Managers except at meetings duly called and held pursuant to rules adopted by the Managers, and copies of said rules, as adopted, shall be mailed to each Syndicate Subscriber. In the event of the death, resignation or incapacity of any Syndicate Manager, the remainder shall have power to select his successor, and such successor shall have the same rights, powers and obligations as if originally named herein.

"[16] It is further understood and agreed that the Syndicate Managers, or any of them, may become Subscribers hereunder in the same manner and with the same rights and obligations as other Subscribers; and that any Syndicate Manager may contract with the others or with any new Company that may be formed hereunder.

"[17] An original of this Agreement shall be signed by the Syndicate Managers and deposited with the First National Bank of Boston, the Depository hereunder, and counterparts hereof may be signed by Subscribers and retained by the Syndicate Managers, and all shall be taken and deemed one original instrument.

"[18] IN WITNESS WHEREOF, the Syndicate Managers, parties of the first part hereto, have subscribed an original hereof, and have lodged the same with the Depository hereunder, and the Subscribers, parties of the second part hereto, have subscribed said original, or a counterpart hereto, as of the day and year first above written.

Subscriber	Address	Amount Syndicate Participation"
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The signatures of the subscribers were secured upon some thirty or more originals in the above form which collectively constituted the agreement.

On January 10, 1910, the syndicate managers, having signed the agreement, met and organized, and adopted rules by which they should be governed.

The essential findings of the master are quoted or described in the opinion.

The following are the plaintiffs' exceptions to the master's report which are mentioned in the opinion:

"9. Because the master fails to explain the distinction between the powers of the syndicate managers in making a gift of stock to the McConnells of 2,500 shares, which he says was wrong, and in making a gift of 20,500 shares of stock to the Butte Central Copper Company, which he says was right."

"11. Because the master has ruled or found that syndicate managers were authorized by the terms of the syndicate agreement to appropriate or transfer 20,500 shares of stock to Butte Central Copper Company, held pursuant to the provisions of the syndicate agreement, to provide additional working capital for the Butte Central Copper Company.

"12. Because the master has found that the syndicate managers who were present at the meeting appropriating the 20,500 shares of stock voted in the belief that they were acting for the best interests of the syndicate, and within the powers conferred upon them by the syndicate agreement."

"19. Because the master has ruled or found that when the defendant syndicate managers voted to appropriate 20,500 shares of the syndicate stock for the benefit of the Butte Central Copper Company, at a meeting held on March 9, 1912, and at the same time voted to tie up, by means of the Federal Trust Company agreement, the 99,282 shares of stock, part of the 130,000 shares, after deducting the said 20,500 shares, that the vote as to said 99,282 shares and the subsequent making of the Federal Trust Company agreement (seemingly because both votes appear in one sentence in the record, or 'passed at same time as part of same scheme') was valid.

"20. Because the master has ruled or found that the defendant syndicate managers were authorized to dispose of the 20,500 shares

of stock, and cause the same to be transferred to the Butte Central Copper Company to be sold or disposed of in connection with the income bonds.

"21. Because the master has ruled or found that the syndicate managers were authorized by the terms of the syndicate agreement to enter into the Federal Trust Company agreement, tying up 99,282 shares of syndicate stock for substantially two years and a half after the syndicate agreement by force and effect of its terms expired, in order to provide additional working capital for the Butte Central Copper Company.

"22. Because the master has ruled or found that the defendant syndicate managers were authorized to continue the syndicate agreement after October 20, 1912.

"23. Because the master has ruled or found that the plaintiffs were not entitled to a winding up of the syndicate within a reasonable time after October 20, 1912, and consequent distribution *pro rata* of the 130,000 shares of stock held for the benefit of the syndicate subscribers pursuant to the provisions of syndicate agreement.

"24. Because (aside from the validity of the appropriation of the 20,500 shares of stock above referred to) the master has ruled or found that the plaintiffs were not entitled to a distribution *pro rata* of the shares of stock then held by the syndicate on October 20, 1912, or within a reasonable time thereafter.

"25. Because the master has ruled or found that the defendant syndicate managers were authorized or justified in paying Creden, the expert, \$750."

"28. Because the master has failed to rule or find that the call for the meeting of March 9, 1912, of the syndicate managers did not empower the syndicate managers to pass the votes at said meeting in reference to the appropriation for the benefit of the Butte Central Copper Company of 20,500 shares of stock and the vote authorizing the agreement with the Federal Trust Company.

"29. Because the master has failed to rule or find that, because of the failure to distribute the 10,218 shares, the syndicate managers became liable in damages to the plaintiffs for the fair market value of said stock.

"30. Because the master has failed to rule or find, either as a

matter of law or matter of fact, that, aside from the block of 20,500 shares and the block of 99,282 shares, the syndicate managers had in their control at the First National Bank 10,218 shares which they should have distributed *pro rata* to the various subscribers of the syndicate agreement within a reasonable time after October 20, 1912.

"31. Because also the master has failed to rule or find as a matter of fact or as a matter of law the rights of the parties plaintiff in connection with 2,718 shares of stock which was part and parcel of the syndicate stock of 130,000 shares."

"39. Because the master has ruled or found that the placing of the stock in trust with the Federal Trust Company by the syndicate managers is valid, because it is included 'in and made a part of the same scheme, by which the additional working capital was to be raised for the company.' "

"41. Because (aside from the master's ruling that the plaintiffs are entitled to injunctive relief enjoining the syndicate managers, First National Bank, and Federal Trust Company from disposing of the shares of stock under the Clinton option [5,000 shares], and to the McConnells by way of gift [2,500 shares]) the master has failed to rule or find, either as a matter of law or as a matter of fact, as to how far or to what extent the defendants, or any of them, are liable to the plaintiffs as to the stock which relates to the Clinton option and the stock which relates to the McConnell transaction, amounting in all to 7,500 shares."

The case came on to be heard before *Pierce, J.*, upon the master's report and the exceptions thereto, and thereupon the justice reserved the case for determination by the full court upon the bill, answers and replication, the cross bill of Demelman and the amendment thereto and the order allowing it, the appeal therefrom, the answers to the cross bill, the replication to the cross bill, the cross bill of Leve, the answers and replication to such cross bill, the rules to the master on the bill and the cross bills, the master's report and exceptions thereto, the motions of the plaintiffs and of Demelman to recommit the master's report, the interlocutory decrees denying the motions, and the appeals therefrom, and the motions and orders for substituting the executors of the will of Demelman as parties defendant and as plaintiffs in the cross bill.

H. T. Richardson, for the plaintiffs.

W. N. Buffum, (*E. M. Schwarzenberg* with him,) for the executors of the will of Lemuel E. Demelman.

W. R. Tillinghast (of Rhode Island) & *Lee M. Friedman*, (*A. E. Burr* with them,) for the defendants Sir Frederick W. Borden and others.

A. C. Burnham, for the First National Bank of Boston.

J. P. Fagan, for the Federal Trust Company, submitted a brief.

PIERCE, J. This case by consent of the parties was referred to the master without objection to or appeal from the terms of the order, which read, "And now it is ordered that the above-entitled cause be referred to Walter F. Frederick, Esquire, as master, to hear the parties and their evidence, to find the facts, decide the case, and report thereon to the court."

The rule in the cross bill read, "In the above entitled cause it is ordered that the cross bill and pleadings therein be referred to Walter F. Frederick, Esq., as master, to hear the parties and their evidence, to find the facts, and report the same to the court."

As regards the first rule, the master in his report states: "The scope of the rule has been questioned by the parties, and I have interpreted the same to direct me to determine matters of law as well as matters of fact, and to make such findings as would have been made by a justice of this court had the case been heard by the court."

Upon the coming in of the report the plaintiffs moved to recommit

"(a) Because the master has not interpreted correctly the rule to him as master, and also has exceeded the powers delegated to him under said rule.

"(b) Because the master has neither authority to determine matters of law nor 'to make such findings as would have been made by a justice of this court had the case been heard by the court.'

"(c) Because the master should have heard the parties and their evidence and reported the facts to the court, and should not and is not justified in making rulings of law.

"(d) Because the master has exceeded his authority as such in making rulings of law.

"(e) Because the master's report should be reformed or recon-

structed, omitting all rulings of law made by him, because he had no authority or right to make such rulings of law."

This motion was denied and the plaintiffs appealed.

The same question of law in identical language is presented by objections and exceptions duly taken and filed.

The plaintiffs argue that "A master has no jurisdictional authority to make rulings of law, even if the court attempts to clothe him with such authority" and cites *New England Foundation Co. v. Reed*, 209 Mass. 556, *Adams v. Young*, 200 Mass. 588, 590, *Clark v. Seagraves*, 186 Mass. 430, 435. In no one of these cases did the rule direct the master to do more than to hear the parties, to take the evidence and to report his findings of fact. They are authority for the position that the power of the master as well as its limitation is to be found in the terms of the rule and consequently that a direction to hear evidence and report facts excludes by necessary implication the right to make rulings of law. The court with or without the consent of parties has authority to have the assistance of a master in the determination of any question of law or of fact necessary or useful to the decision of any pending issue. The right to have the opinion of a master upon conclusions of fact arrived at upon consideration of offered and received evidence necessarily carries with it the right to know upon what theory of law the master acted in arriving at any conclusion of fact or of law to the end that the court may be enabled to determine whether the report shall be accepted or rejected or the whole matter of reference be recommitted to the same or to another master for further hearing upon direction as to the law to be followed. The report of rulings of law is advisory, while findings of fact in the absence of a report of all the material evidence have the weight of a special verdict of a jury. The direction to report findings of fact and rulings of law is not uncommon and the right of the court so to order has, so far as appears by any decision, hitherto stood unquestioned in this Commonwealth. See *Moore v. Dick*, 187 Mass. 207; *Warfield v. Adams*, 215 Mass. 506. Cases like *Clark v. Seagraves*, 186 Mass. 430, and *Hittinger Fruit Co. v. Cambridge*, 218 Mass. 220, where the direction in substance was to "report such facts and questions of law as either party may request," are distinguishable because of the limitation of the master's authority contained in the rule. Without consent of parties the court has

no authority to refer the entire decision of the whole case, but with consent such has long been the practice in equity and at law. *Kimberly v. Arms*, 129 U. S. 512. *Davis v. Schwartz*, 155 U. S. 631, 636. *Gardner v. Boston*, 120 Mass. 266. *Electric Supply & Maintenance Co. v. Conway Electric Light & Power Co.* 186 Mass. 449, 451.

The master's statement that the rule conferred authority "to make such findings as would have been made by a justice of this court" is inaccurate when taken apart from its connection with other parts of the rule, but so read and limited is in essence true.

In any event, no harm resulted and the question of the degree of the judicial function of the master does not require decision.

The question of jurisdiction under the facts is not open; the refusal to recommit as a matter of discretion or as a matter of law was correct and should be affirmed, and the exceptions overruled.

The plaintiffs contend that the clause in paragraph [3] of the agreement reading, "and also for the purpose of purchasing remaining stock of said Butte Central Copper Company;" should be read in connection with and as a part of the clause that directly follows it, first striking out the semicolon, and then inserting before the word "of" the copulative word "and," or inserting before the word "providing" either the word "thereby" or "thus" after striking out the semicolon and the word "of." Thus amended the combined clauses would read, "and also for the purpose of purchasing remaining stock of said Butte Central Copper Company" "and of," "thereby" or "thus" "providing additional working capital for continuing and developing the business of said Butte Central Copper Company and of developing the property owned and controlled by said company, or which may be at any time acquired by it."

The plaintiffs also assert that there was no "remaining stock" after the acquisition of all the treasury stock (one hundred and twenty-five thousand shares) of the company. This construction would leave the clause without force, and would limit the words to description of stock owned by the company after it had disposed of all that it had — a manifest absurdity. The words "remaining stock" under the circumstance should be read remaining outstanding stock, and so read can be given effect and are consistent with the gift or sale of the Davidson stock to the

company (five thousand shares) which was needed to make the holding of the syndicate fifty-two per cent of the capital stock of the Butte Central Copper Company.

Should the clauses be combined and interpreted as the plaintiffs argue ought to be done, the words "additional working capital" naturally would mean the cash paid to the copper company by the syndicate for the one hundred and thirty thousand shares of its stock.

The circumstances existing at the time of the making of the agreement do not require the expunging of the punctuation or the addition of words to the agreement to make certain the intention of the parties to it.

As stated in the paragraphs of the agreement numbered by the master [2] and [3] the syndicate was formed for three purposes:

(a) "For the purpose of acquiring from said International Underwriting Company their rights in 52 per cent, of the capital stock of the Butte Central Copper Company under a contract held by the International Underwriting Company for the purchase of the stock."

(b) "And also for the purpose of purchasing remaining stock of said Butte Central Copper Company."

(c) "Of providing additional working capital for continuing and developing the business of said Butte Central Copper Company and of developing the property owned and controlled by said company, or which may be at any time acquired by it."

That something more than mere stock control of the Butte Central Copper Company was contemplated by the syndicate subscribers is made clear by the provision for a board of managers of "not more than fifteen" with officers, executive committee and power to expend money and make contracts; as also by the provision [8] that "nothing contained in this agreement or otherwise shall constitute the subscribers partners with or agents for one another, or with or for the syndicate managers, or render them liable to contribute in any event more than their individual subscription;" as also by the provision [11], that "The syndicate managers shall have the sole direction and management and the entire conduct of the transaction and business of the syndicate; they are authorized to vote and act in respect of all stocks

held by it, and to do any and all things by them in their sole and absolute discretion deemed proper, necessary or expedient to carry out the purposes of this agreement;" as also by paragraph [15] ". . . No action shall be taken by said syndicate managers except at meetings duly called and held pursuant to rules adopted by the managers, and copies of said rules, as adopted, shall be mailed to each syndicate subscriber."

Among the rules adopted was Article IV, which provided for an executive committee and defined its powers: Section 2. "(a) If, as contemplated in the syndicate agreement, the syndicate acquires an interest in the majority of the stock of the Butte Central Copper Company, the executive committee shall have power to act in an advisory capacity with the officers of that company as to any and all matters connected with the administration of the company and the transaction and development of its ordinary and regular business. (b) The committee shall have power, without authorization of the managers, to incur and direct the payment of expenses and disbursements for all such investigations and examinations by counsel, accountants or other experts and for such incidental expenses as it may deem necessary."

The words "to do any and all things by them in their sole and absolute discretion deemed proper, necessary or expedient to carry out the purposes of this agreement" conferred upon the managers the highest possible power. This discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is without any check or control from any superior tribunal. *Gisborne v. Gisborne*, 2 App. Cas. 300. *Tempest v. Camoys*, 21 Ch. D. 571.

The plaintiffs' exception number twenty-five, is founded upon their contention that the syndicate managers were not authorized or justified in paying one Creden \$750 for expert service. It appears that Creden had prepared and submitted to the copper company a partial report of the "values of the ore bodies;" that it was the opinion of the managers that "it would be in the interests of the syndicate and would greatly aid in the carrying out of the purposes of the syndicate" to have such report made complete. Accordingly, the managers directed the employment of Creden, and paid for his services when rendered to the syndicate.

Manifestly such information was valuable and necessary to a proper and complete understanding of the business of the copper company and especially to the executive committee, whose business it was "to act in an advisory capacity with the officers of the [copper] company as to all matters connected with the administration of the company."

We are of opinion that the employment of Creden was within the scope of the duties and powers imposed and conferred upon the syndicate managers, and the exception must be overruled.

The plaintiffs' exceptions twenty-nine, thirty, thirty-one and forty-one require consideration of the managers' vote to transfer shares of stock to McConnell and to Clinton.

The vote to set aside twenty-five hundred shares of stock, to be delivered to the McConnells at the termination of the syndicate agreement in recognition of faithful past service rendered to the copper company and to the syndicate would have been a commendable recognition of a moral obligation in the syndicate or in the company, but so far as any evidence discloses would have no direct relation to the "purposes" of the syndicate or in any manner contribute to the success of the business of the company or syndicate. It follows that the vote of the managers was without authority and was void.

The vote whereby an option was granted to Robert L. Clinton to purchase at any time before the termination of the syndicate agreement five thousand shares of stock at an agreed price was stated to be upon the consideration of present service and future service to be rendered. There was no legal obligation to pay for such services as Clinton had voluntarily rendered in the past and no binding agreement upon him to render any in the future. This vote was also without authority, and was void.

On March 2, 1912, the secretary of the syndicate managers sent out notices of a meeting of the managers called for March 9, 1912, which stated that the meeting was called for the purpose, among others, of "3. Considering and taking action on ways and means of aiding the Butte Central Copper Company to procure additional funds required to install the proposed mill at the mine."

At a meeting of all the syndicate managers, held on December 2, 1911, it was "Voted that the Syndicate hereby approves and recommends the installation of a suitable concentrating mill at

the Ophir Mine, if all the Directors of the Butte Central Copper Company shall determine that such installation is necessary for the best interests of the Company." This vote of the syndicate managers presumably was taken upon a favorable "completed" report of the expert Creden and upon another report of some "competent mining engineer" as such was directed to be obtained by the vote of the syndicate managers passed June 14, 1910, and was received and paid for subsequent to October 27, 1910.

At the annual stockholders' meeting of the Butte Central Copper Company, held on February 14, 1912, the board of directors, then elected, were authorized to issue income bonds limited to the amount of \$150,000 in the aggregate to provide funds for the installing of a mill for the treatment of ores at the mine, if in their judgment it appeared to be for the best interest of the company.

At the meeting of the syndicate managers held on March 9, 1912, pursuant to the notice of March 2, 1912, after the secretary had made a statement of the action of the stockholders of the Butte Central Copper Company at its annual meeting held on February 14, 1912, and had read its vote and resolution, the syndicate managers "Voted, that the issue by the Butte Central Copper Company of \$150,000, of income bonds, to provide funds for installing a suitable mill for the treatment of ores at the Ophir Mine, as set forth in the said resolution read to this meeting be and is hereby approved and recommended, such action being in accordance with and necessary for the carrying out of the purposes of the syndicate agreement."

"The secretary then stated that, in their endeavors to negotiate a sale of the said income bonds of the Butte Central Copper Company, the officers of that company had reported that, owing to the nature of the security behind the bonds, it would be impossible to sell the same at 80 per cent of their face value, the minimum price fixed thereon as necessary to provide the required amount, unless there was included in such sale 20,500 shares of stock of the said company to be delivered *pro rata* with said bonds, and also that a provision be made for placing the remainder of said stock owned by the syndicate in trust for a period of three years, or until such time as the said income bonds shall be redeemed by the said company; and that the president of the company had asked the syndicate to provide the said stock

and to place the remainder of said stock in trust as above stated."

Following this statement it was "Voted, that in order to carry out the purposes of the Syndicate Agreement of providing additional working capital for continuing and developing the business of the Butte Central Copper Company, 20,500 shares of the stock of said company owned by the Syndicate be forthwith transferred and delivered to the treasurer of the said Company to be sold in connection with the \$150,000 income bonds issued by the Butte Central Copper Company, and that the remaining 109,500 shares of said stock owned by the Syndicate be placed in trust under an agreement whereby the same shall be voted as directed by the Syndicate Managers for a period of three years from the fifteenth day of March, 1912, or until such time within said period as the said income bonds shall be paid and redeemed by the said Company; and also, Further Voted, that the Executive Committee of the Syndicate be and is hereby authorized and directed to have prepared a trust agreement that will meet the above stated requirements and submit the same for approval at the next meeting of the Syndicate Managers."

The plaintiffs, in support of their exceptions nine, eleven, twelve, twenty, twenty-eight and nineteen, twenty-one, twenty-two, twenty-three, twenty-four and thirty-nine vigorously and earnestly contend that the last vote was illegal, in that proper notice was not given of the proposed action and that the vote and all action thereunder was "without consideration to the syndicate, and solely for the purpose of enabling the copper company to sell its issue of bonds," and was in direct and palpable violation of [10] of the agreement which reads: "Unless the object of the syndicate shall be sooner attained as determined by the syndicate managers in their discretion, the syndicate shall remain in force for a period of three years from the date hereof."

We are of the opinion that the notice of March 2, 1912, was sufficient in view of the vote of December 2, 1911, to apprise the individual managers of the purpose of the meeting called for March 9, 1912. Should that meeting vote to procure additional funds required to install the proposed mill at the mine, it was then within the power of the board of managers to determine and provide ways and means to effectuate that result.

In determining whether the vote of March 9, 1912, was in furtherance of the business of the syndicate, we have first of all to take into account the undisputed fact, that the object of acquiring at least a majority of the stock of the Butte Central Copper Company was to enable the syndicate board of managers, through the voting power of the copper company stock, to determine, direct and control the management and policy of the business of the copper company. This is made certain, if evidence were needed, by the vote of the managers wherein they recommended to the copper company the installation of the concentrating mill at the Ophir mine, and the action thereon of the copper company at its annual meeting.

It appears by the master's report, that in December, 1911, and up to and including March 9, 1912, the copper "company had no money in its treasury, and there was little or no money in the treasury of the syndicate." The business of the company was not successful and it was imperative that money be raised by some means to carry on the work of development if the shares of the company were not to become very much reduced in value, or of no value. Confronted by this situation, and by the fact that the bonds would not sell at a price to produce \$150,000 unless there was included in such sale a bonus of shares of stock of the company and an agreement to place the remainder of stock in a voting trust for a period of three years, the syndicate board of managers passed the second vote of March 9, 1912. Thereafter bonds were issued by the company and fifteen thousand twenty-nine shares of stock were delivered upon the order of the managers to the purchaser of the bonds.

At the time of the delivery of the above named shares of stock, all the shares of stock of the syndicate were in the possession of the First National Bank of Boston on deposit, and thereafter the remaining shares of stock were so retained in its custody to the day of the filing of the bill in this suit.

We are of the opinion that the raising of money, to maintain the value of the shares of stock of the syndicate through the development of the property of the copper company, was business of the syndicate within the terms of the agreement, and that the action of the board of managers in the determination of the ways and means of so doing was not, so far as appears by any evidence

in the record, taken in bad faith, in wilful negligence, outside the plan and scope of the agreement or in abuse of "their sole and absolute discretion."

The plaintiffs emphatically contend that they were entitled to receive "the possession, enjoyment and complete right of disposition of copper company stock in October, 1912, with its attendant benefits," and that therefore the agreement that placed the syndicate stock in a voting trust for a period of three years after the termination of the syndicate was outside the plan of the agreement, illegal and void.

The argument is founded upon a misconception of the terms of that agreement, which nowhere provides for a distribution *pro rata* in specie of stock, but does provide that "the affairs of the Syndicate shall be wound up by the Syndicate Managers and the net proceeds in cash or securities, including all dividends and interest received, shall be distributed *pro rata* among the Subscribers not in default."

It appears as a fact, that the managers, upon careful consideration, determined that the placing of the stock in trust was necessary to the protection of the syndicate interest in the copper company, and we cannot say that their judgment was wrong, ill-advised, exercised in bad faith or in wilful negligence. There was no evidence that any demand ever was made upon the syndicate managers for an accounting or that they ever refused to make an accounting, and the master further finds "that a reasonable time for winding up the affairs of the syndicate, after the time when it terminated by the terms of the agreement, was one month after October 20, 1912." As this suit was brought before the expiration of a reasonable time for the winding up of the affairs of the syndicate, it follows that the defendants were not then in default and that the law upon the facts raised no obligation to account. See 2 Harvard Law Review, 241 *et seq.*

It is not necessary to discuss the obligations of the depository and of the transfer agent had the board of syndicate managers acted illegally or in bad faith. See *Dreyfus v. Old Colony Trust Co.* 218 Mass. 546.

We have carefully considered all the exceptions and find no reversible error. A decree must be entered (1) overruling the exceptions and confirming the master's report; (2) perpetually

enjoining the defendants from transferring to Samuel McConnell and Fred McConnell twenty-five hundred shares of the Butte Central Copper Company as voted by the syndicate managers June 14, 1910; (3) perpetually enjoining the defendants from transferring to Robert L. Clinton five thousand shares of the Butte Central Copper Company as voted by the syndicate managers June 14, 1910; (4) dismissing the cross bills.

Decree accordingly.

LAURENCE MINOT & another, administrators, & others vs.
GEORGE BURROUGHS & others, JOHN G. PALFREY & another,
trustees, & others, intervening petitioners.

Suffolk. October 20, 21, 1915. — May 15, 1916.

Present: RUGG, C. J., LORING, CROSBY, PIERCE, & CARROLL, JJ.

Voluntary Association. Syndicate. Words, "Underwriting," "Syndicate," "Good faith."

A dock property in East Boston was purchased by subscribers to an "underwriting syndicate" organized under an agreement in writing. By the syndicate agreement the subscribers appointed two syndicate managers, who were given "as full power over any and all the securities, real estate, property rights, privileges and franchises which they may at any time acquire, or which may at any time be controlled by them, as if they were the owners thereof," including the power to mortgage, pledge or sell the whole or any part of such securities and property. It was provided that, "In consideration of the rights herein granted and of the premises, said Syndicate Managers will endeavor in good faith to accomplish the purposes of this undertaking." The plan set forth in the syndicate agreement was to acquire the dock property at a price deemed to be less than its value and to sell it again at its greater true value to a real estate trust, to be organized by the syndicate, whose shares were to be sold to the public. The syndicate managers issued to the subscribers syndicate receipts, and with the money subscribed bought the dock property and conveyed it to trustees, who in return therefor issued to the managers five thousand shares of the par value of \$100 each of dock trust stock. The managers then formed an operating corporation, to which the trustees leased the dock property for a term of thirty years at a rent sufficient to enable the trustees to pay all expenses, to reduce somewhat a mortgage on the trust property and to pay dividends on the dock trust stock at the rate of five per cent per annum. The managers then sold for cash at par fifteen hundred and ninety-eight shares of the dock trust stock. In spite of considerable expenditures for improvements the operating corporation for three years incurred a substantial deficit. The trustees wrote to the mana-

gers that the trustees would be obliged to reduce the dividends on the dock trust stock to three per cent unless two thousand of the shares, which were held by the managers unsold, should be deposited with the trustees as collateral security for rent and other charges. Thereupon a pledge agreement was made between the managers and the trustees, whereunder two thousand shares of the dock trust stock were deposited by the managers with the trustees to be held until referees should determine that the operating company had demonstrated its capacity to earn sufficient net income to pay its rent or that certain other things had happened, and, if the return of the two thousand shares should not be authorized thus, then the trustees might at the termination of the lease cancel the two thousand shares and reduce to that extent the capital of the trust. The return of the shares thus held as collateral was not authorized in any of the ways provided, and the lease was terminated by the trustees for non-performance of its obligations by the operating corporation. Thereupon holders of syndicate receipts, some of whom had bought them much above par, and none of whom had notice of the pledge agreement until long after its execution and the making of the pledge, brought a suit in equity against the managers and the trustees to set aside the pledge agreement and to require the return of the two thousand shares to the syndicate managers. On an intervening petition certain holders of dock trust shares were admitted as defendants and contended that the pledge agreement was within the power of the managers and involved no breach of duty by the trustees. There was no contention that there was any actual bad faith on the part of the managers. *Held*, that the making and performance of the pledge agreement without notice to the holders of the syndicate receipts were clearly within the broad powers given and intended to be given to the syndicate managers, and that there was no failure of duty on the part of the trustees, who indeed had assumed no obligations toward the holders of syndicate receipts.

In the suit above described it appeared that by an express provision of the syndicate receipts every holder of them became a party to the underwriting agreement and was "bound accordingly," and it was *held*, that the fact that some of the plaintiffs had purchased their syndicate receipts at high prices was of no consequence, as each purchaser became a joint adventurer in the syndicate speculation with all its possibilities of loss as well as of profit.

In the same case it also was *held*, that the mere fact that the pledge agreement might not be concluded before the expiration of the syndicate did not show that the powers of the managers were exceeded in making it, and that there was nothing to indicate that there could not be a distribution of the assets of the syndicate when it expired, subject to the pledge agreement, if that still should be in force.

In the same case it was *held*, that, although neither the managers nor the trustees were under any legal obligation to keep the capitalization of the trust within the limits of its actual earning capacity, yet the attempted execution of a purpose to accomplish this result, so far from being a breach of trust, was an attempt on the part of the managers to carry out in good faith what was deemed by the trustees to be a moral obligation. Moreover certain facts indicated that the pledge agreement was advantageous to the syndicate venture in a business way.

In the same case it was *held*, that the rule against perpetuities had no application to the pledge agreement.

It also was *held* that the pledge agreement under the circumstances disclosed was not contrary to the rule against restraints on alienation.

In the same case, a cross bill having been filed by the trustees against all the other parties to the suit, praying that the two thousand shares of the dock trust held by them as collateral might be cancelled, it was *held*, that the relief prayed for in the cross bill should be granted, and that the principal bill should be dismissed with costs to the defendants but not to the intervenors.

In the case above described, in which the rights of the holders of syndicate certificates depended upon the terms of an "underwriting agreement," it was *said* that the word "underwriting" used in this connection means simply that the persons joining in the scheme agree to furnish the necessary money and to take the shares which are not bought by the public, and that the word "syndicate" used in this connection means an association of persons with a community of interest in the fund raised for carrying on the particular undertaking.

RUGG, C. J. This controversy * grows out of a scheme for the promotion of a real estate trust of dock property in East Boston. The defendants Burroughs and DeBlois, having ascertained that dock property, which they believed and which the master has found they were justified in believing was worth \$1,250,000 or more, could be bought for \$950,000, formed the design of acquiring it at that price for the purpose of reselling it at its actual value to a real estate trust to be organized by them, whose shares they proposed to sell.

In order to get the money with which to execute the general scheme, they organized an "underwriting syndicate" so called, by a written agreement, dated October 12, 1904. Its substantial provisions, after reciting the price at which the dock property could be bought, including their services as a part of its cost, and their purpose to buy it and to sell it again to a real estate trust, and to sell the shares of such trust, set out that each subscriber should contribute on demand the amount subscribed by him; that Burroughs and DeBlois should be the managers with full powers, and should issue receipts, transferable upon their approval, to subscribers, and that the agreement should expire, if not extended, on December 1, 1906. The property was subject to a mortgage of \$750,000. Burroughs and DeBlois, hereafter referred to as the managers, proposed to charge \$50,000 as compensation for all their services in the enterprise. The sum needed, therefore, was \$250,000, being \$200,000 in cash and their commission of \$50,000. This amount was subscribed, the man-

* This suit in equity was brought in the Supreme Judicial Court and was reserved by *Braley, J.*, for determination by the full court.

agers subscribing more than their commission, and was paid as demanded. For these contributions the managers gave semi-negotiable syndicate receipts or certificates. With the money thus obtained they bought the equity of the dock property above the mortgage. In furtherance of the scheme, it was necessary for the managers to secure trustees to hold the title to the dock property. After negotiation, the defendant Codman agreed to serve, with the privilege of selecting his associate.

The dock property was conveyed by the managers to the trustees, who in return therefor issued to the managers five thousand shares, each of a face value of \$100, of National Dock Trust stock, so called. This was consummated on December 14 and 15, 1904.

If the managers could realize their expectation of selling these shares to the outside public at par, the other syndicate subscribers in substance would recover their original investment, together with a return of one hundred per cent profit on their venture, while the managers would get a like return on their cash investment and also their commission of \$50,000 together with a profit on it of one hundred per cent. These percentages of profit were somewhat reduced later by the purchase by the managers of new shares of dock trust stock issued at par for money with which to improve the dock property and reduce the mortgage upon it. But, in any event, the anticipated profit was very large.

In order to make it clear that the dock trust had an assured income sufficient to pay five per cent on its shares, the managers formed a corporation known as the operating company, all the shares of stock in which they owned. That corporation was organized to carry on the business for which the dock property was adapted. It leased that property from the trustees for a term of thirty years at a rental sufficient to enable them to pay all expenses, to reduce somewhat the mortgage, and to pay dividends at the rate of five per cent annually on the shares of stock issued by them. Thus the ultimate success of the whole scheme depended upon the ability of the operating company to earn enough to meet its obligations. Codman received from the syndicate managers on December 22, 1904, a letter agreeing that they would sell none of the trust stock without the permission of the trustees, it being understood that permission would be given when the operating company was shown to be a satisfactory tenant, able to

meet its obligations under the lease; and it further being intimated that possibly some of the stock of the trust might be reduced by cancellation if necessity required, so that its capitalization would be justified by its earnings. Permission subsequently was given by the trustees to the syndicate managers to sell all the shares except eighteen hundred, which were to be held till the trustees were satisfied further of the earning capacity of the operating company. Up to March, 1908, the managers sold for cash at par fifteen hundred and ninety-eight shares of the trust. The underwriting agreement was extended from time to time until December 1, 1910.

In general under this scheme the managers were charged with the duty, so far as concerned the subscribers to the syndicate, of marketing the shares of the trust at the highest price. Broadly, they were clothed with all necessary powers to this end. They had held the title to the dock property. They arranged for trustees to take that title and issue to them all the trust shares. The trustees were a means to that end.

It was essential to the success of their scheme that the managers should be able to sell the trust shares for money to the public. Manifestly this could be accomplished only by convincing the public that the trust shares were a good investment. This could be demonstrated only by showing that the operating company was a tenant able to pay its rent.

Genuine efforts to insure the success of the operating company were made by considerable expenditures for improvements and by securing railroad track connections and otherwise. Nevertheless, the operating company had suffered a substantial deficit for three years. On March 5, 1908, the trustees wrote to the managers that they would be obliged to reduce the dividends on the trust shares to three per cent unless two thousand of these shares were deposited with them as collateral security for the rent and other charges. At this time the managers had not sold and still owned a large part of the trust shares. In consequence of this letter a pledge agreement was made between the trustees and the managers on March 18, 1908, whereby two thousand trust shares were deposited with the trustees by the managers, to be held until it should be determined by referees (a) that the operating company had demonstrated its capacity to earn sufficient net income to

pay its rent, or (b) the lease should be assumed or guaranteed by some responsible person of sufficient financial ability to meet its requirements, or (c) the real estate of the trust should be conveyed to or over ninety per cent of the trust shares be acquired by some one new person; and, if return of the two thousand shares should not be thus authorized, then the trustees might, at the termination of the lease to the operating company, cancel the two thousand shares and to that extent reduce the capital of the trust. The return of the collateral has not been authorized as provided in this pledge agreement. The lease has been terminated by the trustees for non-performance of its obligations by the operating company as lessee. The pledge agreement was executed by the managers without notifying the holders of syndicate receipts and with the knowledge that some of the plaintiffs would not assent to it. An extension of the "underwriting agreement" since has been signed by the plaintiffs in ignorance of the existence of the pledge agreement.

The syndicate receipts or certificates were sold in the market at times considerably above their face value, and some of the plaintiffs paid for them as high as one hundred and sixty and a quarter per cent of their face value. The venture which seemed to promise such a handsome profit to the syndicate receipt holders has turned out disappointingly.

This suit is brought by holders of syndicate receipts to set aside this pledge agreement on the ground that it is null and void, and to order the two thousand shares thus pledged to be returned to the syndicate managers. It is conceded that, in fact, all the parties have acted in good faith.

In the light of these facts, the main contentions of the several parties are these: The plaintiffs contend (1) that the managers were guilty of a breach of trust in turning over the two thousand shares of the dock trust stock under the pledge agreement and that the trustees took these shares with notice and without value; (2) that the trustees obtained the pledge agreement and the surrender of these shares by exerting wrongfully the power which their position as trustees gave them to the disadvantage of one group of their *cestuis que trustent* for the benefit of another group and that therefore they cannot take any advantage thereby; and (3) that the pledge agreement is invalid in other respects.

The trustees and the intervening petitioners, being some of the general public outside the holders of syndicate receipts, who have purchased and are owners of dock trust shares, contend that the pledge agreement was within the power of the managers and involved no breach of their own duty as trustees for all holders of dock trust stock. The managers, as stated in their brief, "are to the largest possible extent neutral in the case at bar," but in general contend that they had power to execute the pledge agreement.

The decision of these contentions depends upon the powers conferred and the duties and obligations imposed upon the managers and the rights secured to the certificate holders by the "underwriting agreement." The pertinent paragraphs of this agreement are printed in a footnote.* The plain purpose of this agree-

* "(3) Said Syndicate Managers shall have as full power over any and all the securities, real estate, property rights, privileges and franchises which they may at any time acquire, or which may at any time be controlled by them, as if they were the owners thereof, including the power to mortgage or pledge, at their discretion, or to sell the whole or any part of said securities, real estate, property rights, privileges, and franchises for cash or credit, or to exchange the same or any part thereof for stock in any corporation, voluntary association, or real estate trust on such terms and conditions as they may deem expedient, and they shall have full power to organize such corporations, voluntary associations, real estate trusts, or other business associations as may in their discretion be advisable to accomplish the purposes hereof, and may cause to be transferred to any of such organizations the whole or any part of the securities, real estate, property rights, privileges, and franchises which may come into the possession or control of said Syndicate Managers, with further power to vote upon any stock held by them, to sell the same at public or private sale for cash or credit or to exchange the same for stock of any other real estate trusts, corporations, or voluntary associations upon such terms and conditions as they deem expedient whenever they see fit, or to pledge any stock held as security for loans and to invest the proceeds, and they shall have full power to make such agreements of whatever kind as may in their discretion be advisable to accomplish the purposes hereof. The securities and property held by them at any time may be sold wholly or in part to the subscribers hereto.

"The enumeration of the specific powers in this agreement shall not be construed as limiting the general powers of discretion intended to be granted said Syndicate Managers, but they are expressly given the power to do anything necessary or proper, in their opinion, to carry out the purposes of this agreement or to promote the best interests of the syndicate. The Syndicate Managers shall not be liable except for want of good faith, and the rights vested in the Syndicate Managers are vested in the firm as the same may from

ment was to confer upon the managers the widest possible powers. Scarcely any form of words could vest a more unlimited potentiality than do those here employed.

The rights of the holders of the syndicate certificates depend upon the terms of the "underwriting agreement." The subscribers are referred to as forming a "syndicate." The promoters are termed "syndicate managers" and the venture is called a "syndicate." These words are employed widely in the dialect of finance. The word "underwriting" simply means that the persons joining in the scheme agree to furnish the necessary money and to take the shares which cannot be sold to outsiders. A "syndicate" in this connection means an association of persons with a community of interest in the fund raised for the purpose of carrying on the particular undertaking. The members share the profits and bear the losses in proportion to their respective interests. The underwriting syndicate was simply an association of those who furnished the money to make the purchase with an

time to time be constituted. Nothing herein contained shall be construed as creating any trust or obligation in favor of any one other than the subscribers nor any obligation in their favor except as herein especially provided.

"(4) The Syndicate Managers . . . may from time to time pay *pro rata* to the subscribers dividends from the cash to the credit of the syndicate, or may in their discretion pay dividends by distributing securities among the subscribers at any time before or upon the expiration of the syndicate, and after payment of all expenses they may divide the securities and property in their hands *pro rata* among the subscribers, or may, in their discretion, convert all the property and securities into cash and distribute such cash among the subscribers *pro rata*."

"(6) This agreement shall expire on the first day of December, 1906, unless the purposes of this instrument have not been accomplished at that time, in which case this agreement may be extended with the consent of a majority in amount of the subscribers, and may, in the discretion of the Syndicate Managers, be terminated earlier if, in their opinion, its purposes have been accomplished or if they deem it inadvisable for the syndicate to continue longer in existence. Upon the termination of the trust the accounts of the Syndicate Managers shall be audited by the Eastern Audit Company of Boston, or some representative selected by said Audit Company, and the approval of said Audit Company or its representative shall operate as a final discharge of the Syndicate Managers from all further responsibility.

"(7) In consideration of the rights herein granted and of the premises, said Syndicate Managers will endeavor in good faith to accomplish the purposes of this undertaking."

agreement that the managers should have full control of the venture and divide the proceeds or assets among the members of the association in proportion to their financial interests. So far as concerned each other, their relations and rights were analogous to those of copartners. *Hambleton v. Rhind*, 84 Md. 456, 487. *Tyser v. Shipowners Syndicate*, [1896] 1 Q. B. 135. *Morrison v. Earls*, 5 Ont. 434, 476. Their powers with respect to each other were not those of partners. Indeed, it is expressly provided in the agreement that the subscribers shall not be partners. But respecting the vital point of sharing profits and bearing losses in proportion to investment, the association bears the earmarks of a partnership. But whether, as between themselves, they were simply beneficiaries under a trust or *quasi* partners is not involved in the issues here presented. The holders of syndicate receipts or certificates get no mysterious advantage out of the use of these phrases.

It is not necessary for the decision of this case to determine the precise technical character of the managers, whether they were trustees or agents. See *Williams v. Milton*, 215 Mass. 1; *Frost v. Thompson*, 219 Mass. 360, 365. The extent of their powers, so far as here material, is the same whatever may be their correct name.

It is manifest that for the success of a scheme like this the largest powers on the part of the managers might be essential. It is difficult to conceive of phrases which would express a more comprehensive grant of power than that created by the underwriting agreement. The absolute control of the whole affair was vested in the managers. Owners in fee, so far as concern the direction of the enterprise and the means to be used, could have no larger authority than was conferred upon the managers. They were exempted from every liability except "for want of good faith." They were required to issue receipts showing the interests of the subscribers. They were empowered, upon the expiration of the syndicate, to distribute the assets, but a broad discretion was conferred in this respect. The only other obligation resting upon them was to "endeavor in good faith to accomplish the purposes of this undertaking." The "purposes of this undertaking" were to make as much money as rightly could be made out of the speculation. The words "good faith" in this connection probably were used in

their common signification of acting honestly and without purpose to defraud. *Lufkin v. Lufkin*, 182 Mass. 476. *Tatam v. Haslar*, 23 Q. B. D. 345. *Searl v. School District Lake County*, 133 U. S. 553, 563. *Pierce v. O'Brien*, 189 Mass. 58. See also *Warren v. Pazolt*, 203 Mass. 328, 347; *Burns' Case*, 218 Mass. 8, 10. But whatever may be the shade of meaning attributable to "good faith," it does not under these conditions require sound judgment and business sagacity. There is no contention that there was actual bad faith on the part of the managers.

The managers were entitled to do with the assets of the syndicate whatever in good faith, acting within the general purpose of the agreement, they thought would be likely to bring the largest profit to the holders of syndicate receipts. The honest exercise of their good judgment is not made subject to approval by the receipt holders, or to review by anybody. The effect of the immunity clause, see *Dreyfus v. Old Colony Trust Co.* 218 Mass. 546, 555, and cases cited; *Tuttle v. Gilmore*, 9 Stew. 617, 622; *Industrial & General Trust Ltd. v. Tod*, 170 N. Y. 233; *Warren v. Pazolt*, 203 Mass. 328; *Perrins v. Bellamy*, [1899] 1 Ch. 797, need not now be discussed, because, for reasons to be stated, it seems plain that these managers did not go outside the scope of the scheme with the execution of which they were entrusted. *Gisborne v. Gisborne*, 2 App. Cas. 300. *Tempest v. Camoys*, 21 Ch. D. 571. *Perrins v. Bellamy*, *supra*.

The selection of trustees to hold the title to the dock property was among the powers reposed in the managers. It was desirable, if not imperative, to secure persons to act in this capacity in whom the public would have confidence. One important factor in the equipment of trustees for such an enterprise well might be a reputation for seeing that there was no "water" in the capitalization of the trust. It would be the desire of all high minded men, managers as well as trustees, that there should be no sale of trust stock which did not represent actual value. This subject was discussed at the outset between the managers and the trustees. Although not made a part of the initial or any subsequent agreement, the attitude of the trustees on this matter was thoroughly understood by the managers. It hardly could be contended that, if an agreement to this end had been made at the start, it would not have been within the power both of managers

and trustees. The powers of the managers were not affected as the events proceeded. There was not at any time an attempt to change the terms of the underwriting agreement. So far as the managers made reports or representations to the holders of syndicate receipts, these did not modify in any way the terms of the underwriting agreement. If these reports have any effect, they can extend no further than the relations between the receipt holders and the managers. Their power to deal with the trustees and with the property held by them under the underwriting agreement was not narrowed. If, during the progress of their "endeavor in good faith to accomplish the purposes of this undertaking," it seemed to the managers wise, in the exercise of their honest judgment, to make the pledge agreement for direct assurance of the purpose that there should be no capitalization of the trust beyond the real and current earning value of the property without depending upon the uncertain potentiality of the future, such agreement was within their power.

The holders of syndicate receipts or certificates had embarked upon a financial speculation under an express agreement. They had entrusted the conduct of that speculation to the managers. They cannot stop half way on that voyage, before the purposes of the undertaking are accomplished, and ask to have some of the courses, laid by the managers in good faith, reversed and new courses taken contrary to the judgment of the managers. They are bound by the terms of their agreement as to the speculation.

The holders of the syndicate certificates have no direct relation to the trustees. Their rights under the syndicate agreement are wholly with the managers. So long as the managers do not exceed the power conferred upon them by the underwriting agreement, the holders of syndicate receipts cannot look beyond the managers. The trustees assume no obligations toward the holders of syndicate receipts. Their relations are wholly with the holders of trust receipts. In this respect the managers are the exclusive representatives of the syndicate receipt holders. So long as the managers do not exceed their powers under the underwriting agreement, the syndicate receipt holders cannot break through its terms. They are bound inexorably by the conduct of the managers within the ambit of that agreement.

The circumstance that some of the plaintiffs bought syndicate receipts at a rather high price is of no consequence in this connection. By the express terms of these receipts every transferee "becomes a party to said [the underwriting] agreement and is bound accordingly." Every transferee bought into the syndicate speculation with all its possibilities for loss as well as profit. He did not buy shares of the dock trust, but became a joint adventurer in the speculation.

The time limited in the original agreement has been extended and has now expired. But the managers were not required to convert all the assets of the syndicate into cash or into free shares of the dock trust at any given time. They could divide the securities and property in their hands among the subscribers. They were only required to "endeavor in good faith to accomplish the purposes of this undertaking."

The mere fact that the pledge agreement might not be concluded before the expiration of the syndicate does not show that the powers of the managers were exceeded. It doubtless was expected by the managers that the dock trust stock would be released from the pledge before the expiration of the underwriting agreement. Apparently such an expectation might have been well founded, for after it was made there was a brief period of prosperity. Moreover, there is nothing to indicate that there could not have been a division of the assets of the syndicate when it expired, subject to the pledge agreement, even if that were still in force. See *Bradley v. Borden, ante*, 575.

It may be assumed that the managers did not undertake toward the purchasers of trust stock a promoter's liability, and that neither the managers nor the trustees were under legal obligation to keep the capitalization of the trust within the limits of actual earning power. But the execution of a purpose to accomplish this result, even though not required by legal obligation, falls far short of being a breach of this trust.

There is much to be said in favor of a design on the part of promoters of such a scheme as this to prevent watering of the stock and to maintain a parity between the face value of the shares and their market value dependent upon the earnings of the property represented thereby. It was not a breach of the underwriting agreement for the managers to attempt to satisfy what was

deemed a moral obligation and to carry out in good faith an understanding of the trustees which may have been nebulous and unenforceable and yet deemed to be in accordance with the requirements of business probity. The maintenance of an ethical standard so high as to outrun legal obligation is not incompatible with the underwriting agreement.

There was an advantage, or what well might have seemed a business advantage, accruing to the syndicate from the pledge agreement, in that the managers were enabled thereafter to market a considerable number of shares of trust stock to the outside public. This result hardly could have been accomplished if the dividend had been reduced to three per cent. As a result of the pledge agreement, the earlier agreement that eighteen hundred shares should be withheld from sale was abrogated.

The circumstances under which the pledge agreement was made show that it was not unreasonable. The facts stated in the trustees' letter to the managers of March 5, 1908, preceding the pledge agreement, were true and warranted, if they did not require, the reduction of the rate of dividends on the dock trust stock from five to three per cent. It was the purpose of the trustees to make the reduction unless the pledge agreement was made. While the trustees probably could not agree to pay dividends or in any way to bind their hands so as not to act at all times for the interests of the trust, *Weller v. Ker*, L. R. 1 H. L. (Sc.) 11, yet the pledge agreement gave every practical assurance that the rate of dividends would not need to be cut in the immediate future. It afforded to the managers opportunity to market a further considerable amount of dock trust stock. It apparently almost enabled them to float the entire venture and to release the stock held under the pledge agreement. These were or well may have been thought advantages to the syndicate.

It was not necessary for the managers to get the consent of the certificate holders to any plan of action within the scope of the powers conferred upon them. The underwriting agreement expresses the idea that the whole success of the venture might depend upon a continuous concentration of absolute power within its general scope in an harmonious honest management, free from the possibility of interference from conflicting views on questions

of expediency. The managers, acting in good faith, obviously were intended to be masters of the affair.

The pledge agreement is not obnoxious to the rule against perpetuities. The equitable interest in the shares was at all times vested in the managers. It was not to be changed except (1) when the legal title also should be revested in the managers, or (2) when the shares should be cancelled and thus extinguished. There is no interest to spring into being at some period beyond the time fixed by the law for the benefit of an uncertain person or class. The rule does not apply to such vested interests as here are disclosed. Gray, *Rule against Perpetuities*, (3d ed.) §§ 205, 322. *French v. Old South Society*, 106 Mass. 479, 488. *Seamans v. Gibbs*, 132 Mass. 239. *Winsor v. Mills*, 157 Mass. 362, 365. *Howe v. Morse*, 174 Mass. 491. Nor is the pledge agreement under the circumstances here disclosed contrary to the rule against restraints on alienation or to anything decided in *Southard v. Southard*, 210 Mass. 347, 356, 357, as applied to these facts.

The pledge agreement was not capricious, was within the powers of the managers and in itself violated no rule of law.

It follows that under the terms of the underwriting agreement the plaintiffs do not show that they are entitled to any relief. They are entitled to none against the managers, for the managers have acted in accordance with their power. They are entitled to none against the trustees, for the trustees owed them no duty. Their only duty was to the managers as holders of trust receipts, and the managers, acting within the scope of their powers, have assented to all that the trustees have done.

It becomes unnecessary to discuss the other points raised and contentions presented, for what has been said shows that no ground for equitable relief is open to the plaintiffs upon this record.

A cross bill has been filed by the trustees against all other parties to the suit, praying that, the lease to the operating company having been terminated, the two thousand shares held by them under the pledge agreement be cancelled. It is an inevitable result of the grounds upon which this opinion rests that a decree should be in accordance with the prayer of this cross bill.

It follows from what has been said that a decree should be entered overruling the exceptions to the master's report and confirming that report, and dismissing the plaintiffs' bill with costs to the defendants but not to the intervenors, and that upon the cross bill of the trustees a decree should be entered declaring that the two thousand shares in the dock trust held by them under the pledge agreement be cancelled.

So ordered.

R. D. Weston, (H. M. Channing with him,) for the plaintiffs.

A. D. Hill, for the defendants Codman and Gardiner.

R. Homans, for the intervening petitioners.

R. W. Hale & H. H. Bundy, for the defendants Burroughs and DeBlois, submitted a brief.

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ABANDONMENT.

It cannot be found that the right to enforce an equitable restriction has been abandoned or relinquished, where no adverse use is established and where there is no evidence of any act of the owner of the land to which the right to enforce the restriction is appurtenant unequivocally manifesting either a present intention to relinquish the restriction or a purpose inconsistent with its further existence. *Hart v. Rueter*, 207.

ABATEMENT.

Of a tax, see that subtitle under TAX.

ABSENTEE.

Vacation, twelve years after its date, of a decree of the Probate Court which had ordered distribution of a fund placed by the court in a savings bank to be held for an absentee. *Jones v. Jones*, 540.

ACTIONABLE TORT.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

All damages resulting to a person from personal injuries due to the negligence of another person should be recovered in one action. Two separate actions cannot be maintained by the same plaintiff, one for suffering and another for expenses incurred for medicine, nursing, care, and medical and surgical attendance caused by the same injury. *Cole v. Bay State Street Railway*, 442.

Evidence at the trial of an action by a woman, against a corporation operating street and elevated railways, for personal injuries, where it appeared that the plaintiff at most was but slightly bruised, was held to warrant a finding that the injuries received by the plaintiff were not wholly mental, but were physical injuries for which she was entitled to recover damages together with damages for mental suffering that arose out of or accompanied such physical injuries. *McCarthy v. Boston Elevated Railway*, 568.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADULTERATED FOOD.

See FOOD.

AGENCY.

Existence of Relation.

Where, in an action by a district nurse against a physician for personal injuries received while in the defendant's automobile, it appeared that the plaintiff was hired and paid by a local organization to attend patients who could not afford a nurse, when called upon to do so by the doctor in charge of such a patient, and that it was her duty to go with a doctor in his automobile at his request to attend a patient and that she was injured during such a transportation, it was a question for the jury whether the plaintiff was being carried by the defendant for hire under her contract of employment. *Loftus v. Pelletier*, 63.

On the evidence at the hearing by a judge without a jury of an action by a bank against a married woman upon a promissory note signed with a firm name containing the name of the defendant's husband, it was held that a finding was warranted that the defendant had authorized her husband to carry on the business, formerly his, for her, and that the note in suit was signed by him by her authority with a firm name under which she was doing business. *Lowell Trust Co. v. Wolff*, 168.

Under the above circumstances, also, there being ample other evidence to establish the husband's agency for the defendant, evidence of certain statements of the husband as to the defendant's relation to the business and to the old firm name were held to be admissible, they not being testimony by an agent to establish his agency. *Ibid.*

Woman passenger standing upon the platform of a terminal station of an elevated railway and injured in the course of playful boxing between two employees of the railway company, who had finished their work for the day and were waiting to take a car home or elsewhere for their own purposes, was held unable to recover from the company because the two men were not in a legal sense its servants or employees when their negligent acts were committed. *Langley v. Boston Elevated Railway*, 492.

Scope of Authority or Employment.

At a hearing upon a petition for the assessment of damages caused to a corporation by the building of a drawless bridge across the Charles River below property of which it was the lessee, it was held proper to exclude statements as to the value of the petitioner's real estate made to an assessor by one who was a director, the clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager, where it did not appear that these officers were authorized by the corporation to speak

for it on that subject or that such statements were within the scope of their official duty. *Brackett v. Commonwealth*, 119.

On the evidence at the hearing by a judge without a jury of an action by a bank against a married woman upon a promissory note signed with a firm name containing the name of the defendant's husband, it was held that a finding was warranted that the defendant had authorized her husband to carry on the business, formerly his, for her, and that the note in suit was signed by him by her authority with a firm name under which she was doing business. *Lowell Trust Co. v. Wolff*, 168.

In an action against the proprietor of a store, who sold goods under contracts of conditional sale, for an assault and battery committed on the plaintiff by an alleged agent of the defendant, when he took from the plaintiff goods that he had sold to her as a canvasser of the defendant upon the cancellation by the defendant of the contract of conditional sale before the first payment had been made on it, it was held that there was evidence for the jury that the defendant's alleged agent was acting within the scope of his authority when he committed the assault and battery upon the plaintiff. *Drake v. Metropolitan Manuf. Co.* 314.

Evidence at the trial of an action against a contractor constructing a subway for personal injuries caused by the unguarded presence of a timber or plank on a sidewalk of a public street where such construction was going on, upon which it was held that the jury were warranted in finding that the plank was placed where it was by the servants of the defendant acting within the scope of their authority. *Murphy v. Hugh Nawn Contracting Co.* 404.

Requirement of the signature of the employee to a bond of a surety company insuring his fidelity was held not to have been waived by the insurer by a certain letter to the insured, not signed by any of the officers authorized to make such a waiver for the corporation and not shown to have come to their knowledge, although the insured relies on the letter and makes no attempt to obtain the signature of the employee. *Wilcock v. Massachusetts Bonding & Ins. Co.* 482.

Woman passenger standing upon the platform of a terminal station of an elevated railway and injured in the course of playful boxing between two employees of the railway company, who had finished their work for the day and were waiting to take a car home or elsewhere for their own purposes, was held unable to recover from the company because the two men were not in a legal sense its servants or employees when their negligent acts were committed. *Langley v. Boston Elevated Railway*, 492.

Scope of authority conferred by the terms of an agreement forming a voluntary association or syndicate upon the syndicate managers. *Bradley v. Borden*, 575.

What are injuries arising out of and in the course of the employment of a workman for which he is entitled to compensation under the workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Effect of Insanity of Principal.

Instance of the termination by the insanity of a dentist of the relation of master and servant between him and his brother who was carrying on his business for him. *Wightman v. Wightman*, 398.

In a suit in equity for an accounting, brought by a dentist against his brother,

Agency (continued).

who had carried on the plaintiff's business for him while the plaintiff was insane, it was held that, as the defendant, although not bound to do so, had carried on the business on the plaintiff's account for a certain length of time, he must account to the plaintiff for his profits during this period. *Wightman v. Wightman*, 398.

In the same suit it also was held that the defendant was not bound to continue this relation indefinitely and had a right to carry on the practice of dentistry on his own account, paying the plaintiff for any of the plaintiff's machinery, tools and furniture of which he made use, and accordingly that the period for which the defendant was bound to account to the plaintiff for his profits ended when the defendant ceased to carry on the work of the office for the benefit and on account of the plaintiff. *Ibid.*

Liability of Vendor to Agent of Purchaser.

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Gearing v. Berkson*, 257.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

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Construction of a certain easement of light and air. *Kessler v. Bowditch*, 265.

ANDERSON BRIDGE.

Determination of various questions of law raised by petitions for the assessment of damages caused by the construction of the drawless bridge over the Charles River, called "Anderson," or "Stadium Bridge," from River Street in Cambridge to Cambridge Street in the Brighton district of Boston. *Brckett v. Commonwealth*, 119.

ANNULMENT OF MARRIAGE.

A decree dismissing a libel by a husband under R. L. c. 151, § 11, for annulling his marriage establishes the status of husband and wife and cannot be attacked collaterally by the husband in his attempted defence to a complaint against him under St. 1911, c. 456, § 1, for refusing to provide for the support of his wife. *Commonwealth v. Shaman*, 62.

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See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; PROBATE COURT.

ARCHITECT.

Architect's certificate was held not to be necessary, under the provisions of a certain building contract, to enable the contractor to charge the owner for the removal of a ledge of stone. *Howard v. Harvard Congregational Society*, 562.

ASSESSMENT.

See TAX; NATIONAL BANK.

ASSIGNMENT.

For Benefit of Creditors.

A creditor of an insolvent corporation, who is liable to the corporation upon an unpaid subscription for shares of its capital stock, when sued upon his subscription by the common law assignee for the benefit of creditors of the corporation, cannot set off the debt of the corporation to him, but must pay for his shares in full and is entitled on his claim against the corporation only to his ratable share in the distribution of the assets among the creditors. *Everett v. Foster*, 553.

ATTORNEY AT LAW.

Where in an intervening petition in a suit in equity setting forth a claim, against a fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [petitioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30. *Rice v. Merrill*, 279.

On a petition for a writ of review no relief will be given from results that naturally followed negligence of the petitioner's counsel in the preparation of the trial of the petitioner's case in the Superior Court. *Watson v. Wenz*, 341.

AUTOMOBILE.

Action by a district nurse against a physician for personal injuries received while in the defendant's automobile and on the way to attend a patient at the request of the defendant. *Loftus v. Pelletier*, 63.

Where one, in whose name the owner of an automobile had permitted the automobile to be registered, without the owner's knowledge or consent left the automobile in a public garage, and thereafter, learning these facts, the owner wrote to the proprietor of the garage a certain letter, it was held that thereafter, under St. 1913, c. 300, § 1, the proprietor of the garage had a lien on the automobile for proper charges for storage and care. *Doody v. Collins*, 332.

And therefore the owner was held not entitled to take the automobile from the

Automobile (continued).

garage by virtue of a writ of replevin which he sued out without paying or tendering to the proprietor of the garage his proper charges, if the proprietor did nothing to estop himself from contending either that he had a lien or that the owner had made no sufficient tender. *Doody v. Collins*, 332.

And the mere fact, that the proprietor of the garage "at the time of replevin" claimed and demanded payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, was held not to estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender. *Ibid*.

Where the agent of a manufacturer of automobiles had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, an employee who at the invitation of a chauffeur was riding in such a car when a collision occurred and he was injured was held to be in the position of a trespasser to whom the employer owed no duty of care. *Walker v. Fuller*, 566.

For cases involving questions of liability for negligent operation of automobiles, see appropriate subtitle under NEGLIGENCE.

BAILMENT.

It was held that the evidence at the trial of an action against a speedometer maker for damage to the plaintiff's automobile caused by the defendant negligently permitting it to be stolen when it had been entrusted to him to have its speedometer repaired entitled the plaintiff to go to the jury, as it could be found that the defendant had accepted the custody of the car as a bailee for hire and was bound to exercise due care for its safety and protection. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

BANK.

Our tax law makes no discrimination in favor of shareholders of trust companies as against shareholders of national banks. *A. J. Tower Co. v. Commonwealth*, 371.

The rule for determining the amount of the franchise tax to be levied on domestic business corporations owning shares of stock in national banks does not violate U. S. Rev. Sts. § 5219. *Ibid*.

BANKRUPTCY.

Determination of Insolvency of Partner.

In determining whether a bankrupt was insolvent at the time of making an alleged unlawful preference, it is right in computing the bankrupt's assets and liabilities to add to the personal debts of the bankrupt the debts of a partnership of which he was a member and for the debts of which he was liable jointly with a partner besides individually because he had agreed to pay the debts of the partnership on its dissolution. *Rubenstein v. Lottow*, 227.

Rights of Trustees.

Failure of a stockholder to tender to a customer within a reasonable time certificates of stock which he had purchased for the customer was held to preclude a trustee in bankruptcy of the stockholder, who, upon the customer refusing to accept the certificates, had sold them at a loss, from recovering from the customer the difference between the price the stockholder had paid and the price for which the trustee had sold. *Brown v. Rushton*, 80.

Unlawful Preference.

Under the provision of § 60 a of the bankruptcy act of 1898 as amended, relating to an unlawful transfer as a preference, the effect of the enforcement of the transfer referred to is the effect it will have at the time the petition in bankruptcy is filed. *Rubenstein v. Lottow*, 227.

The provision of § 60 b of the bankruptcy act of 1898 as amended means that a transfer is voidable if the person to whom it was made had reasonable cause to believe that the transfer would result in a preference if enforced at the time of bankruptcy. *Ibid.*

Under such § 60 b, mere ground for suspicion is not "reasonable cause to believe." *Ibid.*

Under that section it was held that a defendant to whom a preference was made had reasonable ground to believe that a certain transfer would result in a preference, where, among other facts, it appeared that the defendant was the uncle of the bankrupt, had aided him in his business ventures, had made frequent examinations of his books of account, had advanced money to him on an assignment of accounts immediately preceding the bankruptcy, and in general had been intimately familiar with the bankrupt's commercial standing. *Ibid.*

The decision of this court at a previous stage of this case reported in 220 Mass. 156, to the effect that certain acts of a creditor were a fraud upon the law, so that the trustee in bankruptcy in a suit in equity against such creditor could recover the value of certain accounts assigned to the creditor without returning the money received for such accounts by the bankrupt, was affirmed. *Ibid.*

Where an insolvent person, who later became a bankrupt, had a deposit and account at a bank, to which he owed money upon notes not then due, and drew out the money by a check payable to the bank and delivered it to the bank to be applied toward reducing his indebtedness, and where the attempted set-off took place within the four months preceding the filing of the petition in bankruptcy, it cannot be ruled as matter of law that there has been a preference, but it must be determined as a fact. *Putnam v. United States Trust Co.* 199.

Finding and ruling, by a judge who heard a suit in equity by a trustee in bankruptcy against a bank to recover money alleged to have been paid by the bankrupt to the defendant as a fraudulent preference, that the defendant was entitled to retain the money thus paid to it by the bankrupt, were sustained on the ground that the money was not paid under a previous transaction between the defendant and the bankrupt, consisting of the loan and the discount of the notes, but was paid in rescission by the parties of that transaction. *Ibid.*

Bankruptcy (continued).

In the same suit the trial judge found, as to subsequent payments to satisfy indebtedness to the defendant, that the defendant had reasonable cause to believe that a preference would be effected in its favor and to its advantage over other creditors of the bankrupt by the payments and ruled that the plaintiff was entitled to recover this amount, and it was held that the finding and the ruling of the judge could not be said to be wrong. *Putnam v. United States Trust Co.* 199.

Effect of Discharge.

In an action of contract, the defendant in which filed a petition in bankruptcy while the action was pending and obtained a discharge, but, although a suggestion of bankruptcy was filed, the defendant filed no answer setting up his discharge in bankruptcy as a bar to the plaintiff's claim, it was assumed in the record before this court and in the briefs of the counsel on both sides that the discharge had the same effect that it would have had if duly pleaded, and the case was so treated by this court. *Fingold v. Schacter*, 274.

In the case described above there was no existing attachment or equitable lien, no bond had been given to dissolve the attachment and no money had been paid into court, and it was held that the discharge in bankruptcy barred the action and that no special judgment could be entered under R. L. c. 177, §§ 24, 25. *Ibid.*

BETTERMENT.

See appropriate subtitle under TAX.

BILL OF LADING.

Method of shipment by a vendor of goods which was held not to have given to the vendee a right of inspection to which he was entitled, nor to the carrier a right to permit an inspection. *Paddleford v. Lane & Co. Inc.* 113.

Shipper was held unable to maintain an action against a carrier for an alleged misdelivery of a box which the carrier had delivered according to the directions in a straight bill of lading under St. 1910, c. 214, §§ 4, 10, for the transportation of the box to a consignee in another State, which was accepted and kept by the shipper for three months without making any objection to it, although there was a mistake in the address of the consignee as written in the bill of lading, because the carrier had performed the contract in writing by which the plaintiff was bound. *Porter v. Ocean Steamship Co. of Savannah*, 224.

BILLS AND NOTES.

Validity.

Although under the small loans act notes given in violation of its provisions are declared by St. 1911, c. 727, § 17, as amended by St. 1912, c. 675, § 5, to be void, and the amount of any unlawful interest paid upon them may be recovered back in an action at law, a remedy in equity also is given expressly by St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4. *Thomas v. Burnce*, 311.

Whether Joint or Several.

Under R. L. c. 73, § 34, cl. 7, where a promissory note contains the words, "I [with the word 'We' written above it] promise to pay," and is signed by two persons, they are jointly and severally liable thereon. *Lewenstein v. Forman*, 325.

Payee's Remedies.

The payee of a joint and several promissory note at the same time may pursue his remedy against one of the joint makers in equity and against the other at law. *Lewenstein v. Forman*, 325.

BOARD OF FIRE ENGINEERS.

Where a town has voted to purchase a fire engine and makes an appropriation for the purpose but does not designate the part of the town where the engine shall be kept and used, it is within the power of the board of fire engineers under R. L. c. 32, § 45, to determine at what fire station in the town the engine so purchased shall be placed and maintained. *Pope v. Berry*, 473.

BOND.

Supersedeas Bond.

Where, on a petition, filed under R. L. c. 193, §§ 15-17, to vacate a judgment in the sum of over \$15,000, a judge of the Superior Court erroneously issued an order that notice issue and that, upon the filing of a bond for \$5,000, a writ staying execution should issue, it was held that he might correct the error before he ordered that the judgment be vacated and that a writ of supersedeas should issue, because the hearing upon the petition was still open. *Hunt v. Simester*, 489.

Bond dissolving Injunction or Attachment.

Under R. L. c. 159, § 19, as amended by St. 1911, c. 284, § 1, a defendant in a suit in equity, as against whom a bill is dismissed by a decree that orders his co-defendant to pay a sum of money to the plaintiff, is not "a party who is aggrieved" by such decree, from which his co-defendant does not appeal, by reason of the fact that he may be affected by the decree because he is a joint obligor with his co-defendant on a bond dissolving an injunction in the same suit. *Donovan v. Donovan*, 6.

Fidelity Insurance Bond.

Requirement of the signature of the employee to a bond of a surety company insuring his fidelity was held not to have been waived by the insurer by a certain letter to the insured, not signed by any of the officers authorized to make such a waiver for the corporation and not shown to have come to their knowledge, although the insured relies on the letter and makes no attempt to obtain the signature of the employee. *Wilcock v. Massachusetts Bonding & Ins. Co.* 482.

Bond (*continued*).*Administrator's Bond.*

Action by a creditor of the estate of a deceased person upon the probate bond of a former administrator. *McIntire v. Conlan*, 389.

BOSTON.

A decree, entered after the rescript stating the decision reported in Boston, petitioner, 221 Mass. 468, was held to be correct. *Boston, petitioner*, 36.

It also was held that the rescript accurately expressed the judgment of this court. *Ibid.*

A petition to assess damages for land taken by the street commissioners of the city of Boston under St. 1909, c. 486, § 31, by a taking originally invalid which afterwards was made valid by the confirmatory statute St. 1914, c. 569, can be filed only in the county of Suffolk, and such a petition filed in the county of Middlesex must be dismissed. *N. Ward Co. v. Boston*, 367.

Under St. 1913, c. 672, and St. 1914, c. 314, § 2, as amended by St. 1905, c. 243, § 1, one employed as cashier in the collecting department of the city of Boston cannot be removed from office by a letter from the collector notifying him that he is discharged at the close of business on the date of the letter and that, if requested, a hearing would be granted him within a month. *Tucker v. Boston*, 478.

And if such employee, upon receiving such a letter, without asking for any hearing ceases to perform the duties of cashier and attempts unsuccessfully to procure employment elsewhere, he may maintain an action of contract against the city for damages resulting from the breach by the city of the contract of employment, and he is not restricted to the remedy provided by St. 1908, c. 210, § 3, there called "a petition in the form of mandamus," to compel the restoration of his name to the pay-roll. *Ibid.*

BOSTON, HARBOR OF.

See HARBOR MASTER OF THE HARBOR OF BOSTON.

BOSTON FIRE DEPARTMENT.

A hoseman stationed at an engine house in the city of Boston, who is a member of the fire department of that city, is not a laborer, a workman or a mechanic within the meaning of St. 1913, c. 807, § 1, which provides that a city accepting that statute shall pay compensation in the manner provided in the workmen's compensation act to "laborers, workmen and mechanics employed by it." *Devney's Case*, 270.

BOSTON TRANSIT COMMISSION.

The Boston Transit Commission, in constructing the Dorchester tunnel under the authority given to them by St. 1911, c. 741, and in making contracts in the name of the city for such construction under § 17 of that statute, are acting as public officers and not as servants or agents of the city. *Murphy v. Hugh Nawn Contracting Co.* 404.

In St. 1911, c. 741, relating to the construction by the Boston Transit Commission of certain subways and tunnels, the provision in § 18 as to leaving streets "open for traffic" during certain hours when the work is being done is intended to include in the word "traffic" travel upon such streets for any proper purpose by pedestrians and vehicles, and includes a crossing of such a street by an employee in a store facing on it for the purpose of posting a letter in a mail box. *Stewart v. Hugh Nawn Contracting Co.* 525.

Liability of the city and of a contractor in actions for injuries received by such an employee at a place where planking had been substituted for the pavement. *Ibid.*

The fact that, if the Boston Transit Commission itself had done certain work in the construction of a subway under the provisions of St. 1911, c. 741, the city of Boston would not have been liable for its negligence because the commissioners were public officers, was held not to free a contractor who did the work from liability in an action by a traveller for personal injuries caused by a defect in a plank substituted by the contractor for the pavement. *Ibid.*

BOUNDARY.

A boundary, which was a part of the description of a parcel of land in a deed and was designated as running "by the southerly line of" a certain street "extended," was held properly to have been found not to indicate that the street itself existed at the place of the extended line but merely to describe the line that would exist if the street should be extended at that place. *Hobart v. Weston*, 161.

BRIDGE.

A decree, entered after the rescript stating the decision reported in Boston, petitioner, 221 Mass. 468, was held to be correct. *Boston, petitioner*, 36.

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BROKER.

STOCKBROKER, see that title.

BURIAL.

Oral evidence was held to be admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the cemetery and that the right was granted subject to the condition that the certificate holder should grade and care for the lot and that, if he failed to do so, the right of burial might be revoked and remains interred in the lot might be removed. *Green v. Danahy*, 1.

Burial (*continued*).

Bill in equity to enjoin the proprietor of such lot from removing remains therefrom when the condition above described was not fulfilled was dismissed. *Green v. Danahy*, 1.

CAPITAL AND INCOME.

A dividend made by a corporation from its accumulated surplus profits is none the less to be treated as income because a part of the surplus came from a special dividend that it received upon the shares of another corporation held by it and was derived by such other corporation from its profits in the sale of certain property held by it. *Gray v. Hemenway*, 293.

Nor is such a dividend any the less to be treated as income because derived in part from profits gained in the conversion into shares of certain convertible bonds previously issued by the corporation. *Ibid*.

Where a dividend is declared on shares in a corporation held by a trustee under a trust and where the vote of the directors of the corporation recited that such dividend was "declared out of accumulated surplus profits of this company," which recital is true, the whole of the dividend must be treated by the trustee as income and distributed, although the larger part of the dividend is payable in shares of another corporation and the whole dividend amounts in value to \$33.30 on each share of \$100. *Ibid*.

CARRIER.

Of Passengers.

No contract giving rise to the relation of carrier and passenger will be implied on the part of a railroad corporation from mere passive acquiescence on its part in a customary use, by persons intending to board its trains as passengers when the trains stopped at a certain station, of a portion of its premises near a track but separated from the station by two tracks and an open girder bridge. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.

Consequently there can be no recovery under St. 1906, c. 463, Part I, § 63, for causing the death of a person who, while standing at such place, was killed by a passing train, unless such person is shown to have been in the exercise of due care. *Ibid*.

Where one having a certificate for a third class passage in a steamship exchanged it for a third class ticket and sailed on the steamship, he thereby accepted a stipulation printed in English on the ticket limiting the liability of the steamship company for loss of baggage to \$50, although he did not understand the English language and before receiving his ticket he asked the person in charge of the ticket office to have his baggage insured and offered to pay for such insurance and was told by the man in the ticket office that this was not necessary. *Secoursky v. Oceanic Steam Navigation Co.* 465.

Actions for personal injuries or death of passengers caused by negligence of street railway, elevated railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

Of Goods.

Method of shipment by the vendor of goods which was held not to have given to the vendee a right of inspection to which he was entitled, nor to the carrier a right to permit an inspection. *Paddleford v. Lane & Co. Inc.* 113.

Shipper was held unable to maintain an action against a carrier for an alleged misdelivery of a box which the carrier had delivered according to the directions in a straight bill of lading under St. 1910, c. 214, §§ 4, 10, for the transportation of the box to a consignee in another State, which was accepted and kept by the shipper for three months without making any objection to it, although there was a mistake in the address of the consignee as written in the bill of lading, because the carrier had performed the contract in writing by which the plaintiff was bound. *Porter v. Ocean Steamship Co. of Savannah*, 224.

CEMETERY.

Oral evidence was held to be admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the cemetery and that the right was granted subject to the condition that the certificate holder should grade and care for the lot and that, if he failed to do so, the right of burial might be revoked and remains interred in the lot might be removed. *Green v. Danahy*, 1.

Bill in equity to enjoin the proprietor of such lot from removing remains therefrom when the condition above described was not fulfilled was dismissed. *Ibid.*

CHELSEA BRIDGE.

A decree, entered after the rescript stating the decision reported in Boston, petitioner, 221 Mass. 468, was held to be correct. *Boston, petitioner*, 36.

It also was held that the rescript accurately expressed the judgment of this court. *Ibid.*

CHILD.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way. *Patrick v. Deziel*, 505.

Whether a child doing so was guilty of contributory negligence, see *Ibid.*

As to negligence of one in charge of a child, see appropriate subtitle under NEGLIGENCE.

See also PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

Section 1 of St. 1914, c. 600, which provides that "In all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference," is in no way confined in its application, by the subsequent sections of the statute referring to the civil service, to those cities and towns where the classified civil service prevails under the civil service law. *Lee v. Lynn*, 109.

The provisions contained in St. 1914, c. 600, §§ 2, 3, prohibiting the civil service commission from placing upon its lists any person not a citizen of the United States, and providing for the discharge of aliens temporarily appointed be-

Civil Service (*continued*).

cause of a lack of a list of eligible appointees, are constitutional and valid. *Lee v. Lynn*, 109.

Under the provision of St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, § 1, that a person holding office or employment in the classified civil service and sought to be removed "shall be notified of the proposed action . . . and shall, if he so requests in writing, be given a public hearing," the right and the opportunity to claim such a hearing is a condition precedent to removal. *Tucker v. Boston*, 478.

Under St. 1913, c. 672, and St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, § 1, one employed as cashier in the collecting department of the city of Boston cannot be removed from office by a letter from the collector notifying him that he is discharged at the close of business on the date of the letter and that, if requested, a hearing would be granted him within a month. *Ibid*. And if such employee, upon receiving such a letter, without asking for any hearing ceases to perform the duties of cashier and attempts unsuccessfully to procure employment elsewhere, he may maintain an action of contract against the city for damages resulting from the breach by the city of the contract of employment, and he is not restricted to the remedy provided by St. 1908, c. 210, § 3, there called "a petition in the form of mandamus," to compel the restoration of his name to the pay-roll. *Ibid*.

CLAIRVOYANT.

At the trial of a complaint under R. L. c. 76, § 8, for practicing medicine without being lawfully authorized and registered, where the defendant assumed to be a clairvoyant and also contended that he merely sold medicines as the agent of two corporations, instructions to the jury to the effect that under § 9 the defendant lawfully could not prescribe medicine for the cure of disease were held to be correct. *Commonwealth v. Lindsey*, 392.

COMITY.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

COMMISSIONERS.

Commissioners appointed by a court under statutory authority, in the absence of an express provision to the contrary, must report their doings to the court by which they were appointed. *Brackett v. Commonwealth*, 119.

COMMONWEALTH.

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, relating to the giving of preference in public works to citizens of the Commonwealth, do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. *Lee v. Lynn*, 109.

CONFLICT OF LAWS.

Tax on Legacies and Successions.

Under St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, it is for the courts of this Commonwealth to determine whether property of a resident of this Commonwealth which is not therein at the time of his death is "legally subject" to a legacy tax in another State or country. *Welch v. Treasurer & Receiver General*, 87.

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State, such shares have a *situs* both in this Commonwealth, which is the owner's domicil, and in such other State, which is the domicil of the corporation, sufficient to give jurisdictional power to both States to impose a succession tax. *Ibid.*

If a resident of this Commonwealth at the time of his death owns shares of capital stock in a railroad corporation incorporated in three other States in which it operates its railroad, each of such three other States has jurisdictional power to impose a succession tax upon the shares. *Ibid.*

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State and owning property in a third State, such shares are not, under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, "legally subject" to a succession tax in the third State, because that State has no jurisdictional power to levy the tax. *Ibid.*

And, even if such a tax is levied and paid in such State, there should not be any deduction by reason of such payment from the tax here imposed upon the shares by the provisions of the statute. *Ibid.*

In the absence of something to indicate inequality before the law, inevitable and general disproportion, or oppressiveness or discrimination, a succession tax imposed by another State within its jurisdictional powers upon shares of stock in a corporation there incorporated is a tax to which the shares there are "legally subject." *Ibid.*

Its amount therefore cannot be questioned in the computation of the tax to be imposed in this Commonwealth under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2. *Ibid.*

In this case in imposing a succession tax upon shares of the capital stock of a railroad corporation incorporated in Michigan, Illinois and Wisconsin, which were owned by a decedent domiciled in Massachusetts at the time of his death, a Probate Court of the State of Michigan computed the tax as though the corporation were incorporated solely in Michigan and it was held that that tax was one to which the shares were "legally subject" in Michigan and that its amount should be considered in computing the succession tax due in this Commonwealth. *Ibid.*

Rights of Action for Death by Negligence.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the

Conflict of Laws (continued).

right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

CONSORTIUM.

Under the circumstances appearing in actions by a husband and a wife against a provision dealer for personal injuries resulting from a sale of unwholesome food, it was held that neither spouse had a right to recover for the loss of consortium. *Gearing v. Berkson*, 257.

CONSTITUTIONAL LAW.

Separation of Departments of Government.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is contrary to art. 30 of the Declaration of Rights, which declares the separation of the legislative and judicial departments of the government. *Dinan v. Swig*, 516.

Ex post Facto Law.

St. 1913, c. 563, § 7, making it a misdemeanor for the father of an illegitimate child to neglect or refuse to contribute reasonably to the support and maintenance of such child, whether such child shall have been begotten before or after the taking effect of that statute, is not an *ex post facto* law and does not violate art. 24 of the Declaration of Rights nor art. 1, § 9, of the Constitution of the United States. *Commonwealth v. Callaghan*, 150.

Police Power.

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, relating to the giving of preference in public works to citizens of the Commonwealth, do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. *Lee v. Lynn*, 109.

Nor are the provisions of the statutes mentioned above in conflict with the Constitution of this Commonwealth. *Ibid.*

The provisions contained in St. 1914, c. 600, §§ 2, 3, prohibiting the civil service commission from placing upon its lists any person not a citizen of the United States, and providing for the discharge of aliens temporarily appointed because of a lack of a list of eligible appointees, are constitutional and valid. *Ibid.*

Control of Legislative Elections.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of mem-

bers of the General Court is contrary to c. 1, § 3, art. 10, of the Constitution, which provides that "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members." *Dinan v. Swig*, 516.

Construction and Maintenance of Bridges by Municipalities.

The decision in Boston, petitioner, 221 Mass. 468, that St. 1911, c. 581, as amended by St. 1913, c. 341, is constitutional, was affirmed. *Boston, petitioner*, 36.

CONTRACT.

Consideration.

Agreement of a landlord to thaw out frozen pipes, made because a tenant threatened to leave the tenement unless that was done, was held not to be gratuitous. *Franco v. Maker*, 71.

What constitutes.

If two persons, who are the trustees of a real estate trust, make a contract in writing for work and material to be furnished to them and sign the contract with the word "trustees" after their names, they are none the less on this account liable on the contract personally. *Philip Carey Co. v. Pingree*, 352.

Shipper was held unable to maintain an action against a carrier for an alleged misdelivery of a box which the carrier had delivered according to the directions in a straight bill of lading under St. 1910, c. 214, §§ 4, 10, for the transportation of the box to a consignee in another State, which was accepted and kept by the shipper for three months without making any objection to it, although there was a mistake in the address of the consignee as written in the bill of lading, because the carrier had performed the contract in writing by which the plaintiff was bound. *Porter v. Ocean Steamship Co. of Savannah*, 224.

Where one having a certificate for a third class passage in a steamship exchanged it for a third class ticket and sailed on the steamship, he thereby accepted a stipulation printed in English on the ticket limiting the liability of the steamship company for loss of baggage to \$50, although he did not understand the English language and before receiving his ticket he asked the person in charge of the ticket office to have his baggage insured and offered to pay for such insurance and was told by the man in the ticket office that this was not necessary. *Secoulsky v. Oceanic Steam Navigation Co.* 465.

Requirement of the signature of the employee to a bond of a surety company insuring his fidelity was held not to have been waived by the insurer by a certain letter to the insured, not signed by any of the officers authorized to make such a waiver for the corporation and not shown to have come to their knowledge, although the insured relies on the letter and makes no attempt to obtain the signature of the employee. *Wilcock v. Massachusetts Bonding & Ins. Co.* 482.

Validity.

A provision, in an ordinary commercial contract in writing between a Massachusetts corporation and a Pennsylvania corporation, that the Massachusetts corporation shall not sue the Pennsylvania corporation except in the courts of Common Pleas in the State of Pennsylvania, is void and cannot be enforced to deprive the courts of this Commonwealth of jurisdiction. *Nashua River Paper Co. v. Hammermill Paper Co.* 8.

The provision of a certain pass under which a person was permitted to go upon a vessel lying in dock was held not to be void as contrary to public policy. *Freeman v. United Fruit Co.* 300.

Validity of an agreement in writing organizing an underwriting syndicate for the exploitation and promotion of a dock property in East Boston, whereby the subscribers appointed two syndicate managers with full powers, the plan set forth in the syndicate agreement being to acquire the dock property at a price deemed to be less than its true value and to sell it again at its greater true value to a real estate trust, to be organized by the syndicate, whose shares were to be sold to the public. *Minot v. Burroughs*, 595.

Construction.

On the evidence at the trial of an action of contract, made by correspondence, for the purchase price of cabbages, it was held that the judge made a material error in his charge in describing the contract as one for a sale of "Danish cabbage," because the contract was for a sale of "fine stock" cabbages and came within the rules of law applicable to contracts for the sale of goods of "specific quality." *Paddleford v. Lane & Co. Inc.* 113.

Where an owner of land gives to a bank an order in writing to "pay to the order of" a building contractor a certain sum of money "on architect's order and authorization by" the owner, the bank acts within the order if it makes a payment to the contractor on an order in writing by the architect which is authorized by the landowner orally. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

Construction of a contract to furnish twenty-four thousand tons of furnace coke and of a provision therein as to quality upon which it was held, that there was no warranty in the contract as to the quality of the coke to be delivered during the first one or two months under the contract. *Federal Coal & Coke Co. v. Coryell*, 430.

In the same case a representation made by an officer of the seller and relied on by the buyer was held to have been promissory in its nature and to have stated a reasonable expectation of the seller, and accordingly its falsity did not entitle the buyer to avoid the contract on the ground of fraud. *Ibid.*

In an agreement to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, a requirement of delivery within a reasonable time is implied. *Homer v. Baker Yacht Basin, Inc.* 500.

Evidence at the trial of an action on such a contract, which was held to warrant a finding that the contract was performed by the seller within a reasonable time and that he was entitled to recover damages for the defendant's refusal to receive the engine. *Ibid.*

In an action of contract against a corporation to recover compensation for the

damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it was held that under the easement and a contract contained in a deed the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

Under a provision in a building contract wherein the contractor under the specifications relating to "Excavations" agreed to "remove all soil, earth and stones" from a designated area to a specified depth, it was held that the material to be excavated by the contractor did not include a certain unforeseen ledge of rock, the removal of which was the duty of the owner under the terms of the contract. *Howard v. Harvard Congregational Society*, 562.

In the action above described it further was held that the excavation of the unforeseen ledge of rock could not be considered an alteration in the work, so that a provision requiring an order in writing by the architect for alterations did not apply to it. *Ibid.*

In the same action it was held, that it was immaterial that the defendant understood and supposed that the work of removing the ledge was done by the plaintiff as a part of the contract, the defendant as matter of law being bound to know and abide by the terms of the contract it had made. *Ibid.*

Construction and effect of an agreement forming a voluntary association, called a syndicate, for the purpose of the acquiring through a contract held by a certain corporation of fifty-two per cent of the capital stock of a certain copper company, and "also for the purpose of purchasing remaining stock of said [copper company]" and of developing the property. *Bradley v. Borden*, 575.

Construction, validity and effect of an agreement in writing organizing an underwriting syndicate for the exploitation and promotion of a dock property in East Boston, whereby the subscribers appointed two syndicate managers with full powers, the plan set forth in the syndicate agreement being to acquire the dock property at a price deemed to be less than its value and to sell it again at its greater true value to a real estate trust, to be organized by the syndicate, whose shares were to be sold to the public. *Minot v. Burroughs*, 595.

Construction of lease of land, see appropriate subtitle under LANDLORD AND TENANT.

Modification.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties. *Gousoulas v. F. W. Stock & Sons*, 537.

Rescission.

Where in an intervening petition in a suit in equity setting forth a claim, against a fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [petitioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part

Contract (continued).

of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30. *Rice v. Merrill*, 279.

In an action by the assignee for the benefit of creditors of an insolvent corporation, which had been a dealer in automobiles and motor vehicles as the sales agent of another corporation, to recover the amount of a subscription signed by the defendant to take and pay for at par a certain number of shares of the capital stock of a corporation, a finding was held to have been warranted that the treasurer of the corporation had made no such misrepresentations as would give the defendant a right to rescind the contract. *Everett v. Foster*, 553.

Performance and Breach.

Failure of a stockbroker to tender to a customer within a reasonable time certificates of stock which he had purchased for the customer was held to preclude a trustee in bankruptcy of the stockbroker, who, upon the customer refusing to accept the certificates, had sold them at a loss, from recovering from the customer the difference between the price the stockbroker had paid and the price for which the trustee had sold. *Brown v. Rushion*, 80.

In an action by a married woman against her husband's father upon his promise to pay her \$1,000 if she would make a home for him, which she did as long as he remained there, it appeared that he soon married again and voluntarily took up his residence elsewhere and refused to pay the \$1,000 or any part of it, and it was held that, the defendant having rendered further performance by the plaintiff impossible, she was entitled to recover damages. *St. John v. St. John*, 137.

And it also was held, that the defendant, having failed to make any provision in the contract for the contingency of his marrying again and leaving the house of his son in a short time, was liable to the plaintiff for the full amount of \$1,000 which he had agreed to pay her. *Ibid.*

In a suit in equity, in which the only material question came to be whether the defendant was liable in damages and, if so, for what amount for failing to carry out the terms of a contract to supply a sum of money to a certain corporation for a particular purpose, it was held that it had not been shown that the plaintiff had suffered any damage from the defendant's failure to carry out the terms of his contract, it being probable that, if he had complied strictly with his agreement, the plant would have been closed down for lack of working capital; and accordingly the bill was dismissed. *New England Iron Works Co. v. Jacot*, 216.

A contract with a city, to perform the duties of a teacher of manual training in the public schools of the city at a fixed yearly salary, is a contract for the personal services of the teacher requiring his individual judgment and ability and is subject to the implied condition that the teacher shall be alive and able to do the work, and therefore is terminated by the teacher's death. *Donlan v. Boston*, 285.

Therefore, where a teacher of manual training in the public schools of a city, who is employed by the year at a fixed salary payable in monthly instalments, dies during the summer vacation after the expiration of eleven months of the school year when he has performed all the service required of him for that year, nothing is due to his executor or administrator for the twelfth month. *Ibid.*

Where an owner of land gives to a bank an order in writing to "pay to the

order of" a building contractor a certain sum of money "on architect's order and authorization by" the owner, the bank acts within the order if it makes a payment to the contractor on an order in writing by the architect which is authorized by the landowner orally. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

Employee in the civil service employment of Boston improperly discharged was held to be entitled to maintain an action of contract against the city for damages resulting from the breach by the city of the contract of employment, and not to be restricted to the remedy provided by St. 1908, c. 210, § 3, there called "a petition in the form of mandamus," to compel the restoration of his name to the pay-roll. *Tucker v. Boston*, 478.

If at the trial of such an action it appears that at a certain time after his discharge from his employment the plaintiff became ill and physically unable to do the work which he had performed for the city, he is limited in his recovery to the amount of his salary from the date of his discharge to the date of such physical incapacity. *Ibid.*

In an agreement to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, a requirement of delivery within a reasonable time is implied. *Homer v. Baker Yacht Basin, Inc.* 500.

Evidence at the trial of an action on such a contract, which was held to warrant a finding that the contract was performed by the seller within a reasonable time and that he was entitled to recover damages for the defendant's refusal to receive the engine. *Ibid.*

It also was held that, in assessing damages for the breach of this contract, the plaintiff's loss of profit and the freight charges paid by him properly might be included. *Ibid.*

In an action of contract against a corporation to recover compensation for the damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it was held that under the easement and a contract contained in a deed the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties. *Gouzonoulas v. F. W. Stock & Sons*, 537.

Waiver of Performance.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties. *Gouzonoulas v. F. W. Stock & Sons*, 537.

In Writing.

Oral evidence was held to be admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the ceme-

Contract (*continued*).

tery and to show a condition subject to which the right was granted. *Green v. Danahy*, 1.

Shipper was held unable to maintain an action against a carrier for an alleged misdelivery of a box which the carrier had delivered according to the directions of a straight bill of lading under St. 1910, c. 214, §§ 4, 10, for the transportation of the box to a consignee in another State, which was accepted and kept by the shipper for three months without making any objection to it, although there was a mistake in the address of the consignee as written in the bill of lading, because the carrier had performed the contract in writing by which the plaintiff was bound. *Porter v. Ocean Steamship Co. of Savannah*, 224.

Where one having a certificate for a third class passage in a steamship exchanged it for a third class ticket and sailed on the steamship, he thereby accepted a stipulation printed in English on the ticket limiting the liability of the steamship company for loss of baggage to \$50, although he did not understand the English language and before receiving his ticket he asked the person in charge of the ticket office to have his baggage insured and offered to pay for such insurance and was told by the man in the ticket office that this was not necessary. *Secoulsky v. Oceanic Steam Navigation Co.* 465.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties. *Gousoulas v. F. W. Stock & Sons*, 537.

Implied.

Where a religious corporation, whose trustees voted to dispense with the services of its priest, thereafter for more than a year accepted such services which he continued to perform, it can be found to be liable to pay for the services. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

It is the duty of a plumber, whom the owner of a house has employed to install a hot water boiler in his basement to be supplied by a hot water coil in a heater which is a part of a hot water heating system, and to whom the owner has left entirely the plan and execution of the work, to perform the work in a workmanlike manner and with reasonable judgment, skill and care according to the approved usages of his trade. *Kelley v. Laraway*, 182.

In an action of contract against a fraternal beneficiary corporation for a death benefit, where the defendant admitted its liability and paid the money into court, and at its request a person who had paid the premiums and assessments on the member's certificate for many years and claimed to be entitled to the death benefit was allowed to interplead, it was held, that the claimant was entitled to be reimbursed for the amount of her payments of premiums with interest thereon. *O'Brien v. Ancient Order of United Workmen*, 237.

Under the sales act, St. 1908, c. 237, § 15, as before at common law, if one buying meat at a shop relies on the skill and judgment of the dealer in selecting the meat and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, the dealer is liable to the buyer for damages resulting from his supplying unwholesome food. *Gearing v. Berkson*, 257.

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her

meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Gearing v. Berkson*, 257.

Building Contract.

Under a provision in a building contract wherein the contractor under the specifications relating to "Excavations" agreed to "remove all soil, earth and stones" from a designated area to a specified depth, it was held that the material to be excavated by the contractor did not include a certain unforeseen ledge of rock, the removal of which was the duty of the owner under the terms of the contract. *Howard v. Harvard Congregational Society*, 562.

In the action above described it further was held that the excavation of the unforeseen ledge of rock could not be considered an alteration in the work, so that a provision requiring an order in writing by the architect for alterations did not apply to it. *Ibid*.

In the same action it was held that it was immaterial that the defendant understood and supposed that the work of removing the ledge was done by the plaintiff as a part of the contract, the defendant as matter of law being bound to know and abide by the terms of the contract it had made. *Ibid*.

CORPORATION.

Distinguished from Stockholders.

In an action upon a covenant in a lease for the rent of a store, the defendant was held not to be entitled to recoup substantial damages for the breach by the plaintiff, the lessor, of a covenant in the lease by which he agreed not to sell neckties or underwear during the term of the lease, because the only damages which resulted from the breach were to a corporation, which occupied the premises, of which the defendant was the principal stockholder and manager and to which he had transferred all his business, although the relation of the lessee to the corporation was known to the lessor when the lease was made. *Thresher v. Simpson*, 349.

Distinguished from Partnership.

The relations of partners as between themselves are not changed by the adoption of the instrumentality and name of a corporation in carrying on their business. *Arnold v. Maxwell*, 47.

Officers and Agents.

At a hearing upon a petition for the assessment of damages caused to a corporation by the building of a drawless bridge across the Charles River below property of which it was the lessee, it was held proper to exclude statements made to an assessor as to the value of the petitioner's real estate by one who was a director, the clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager, where it does not appear that these officers were authorized by the corporation to speak

Corporation (*continued*).

for it on that subject or that such statements were within the scope of their official duty. *Brckett v. Commonwealth*, 119.

Taxation.

Under St. 1909, c. 490, Part III, §§ 11, 20, 41, 43, the tax commissioner, in determining the amount of the franchise tax to be levied upon a domestic business corporation owning shares of stock in national banks, should refuse to make deductions of the value of these shares under § 41. *A. J. Tower Co. v. Commonwealth*, 371.

This rule does not violate U. S. Rev. Sts. § 5219. *Ibid.*

In deciding the points stated above it was assumed, without deciding it, that the payment of the property tax upon the shares of national bank stock owned by the plaintiff, a domestic business corporation, was valid. *Ibid.*

Legacy or Succession Tax on Shares of Stock.

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State, such shares have a *ritus* both in this Commonwealth, which is the owner's domicile, and in such other State, which is the domicile of the corporation, sufficient to give jurisdictional power to both States to impose a succession tax. *Welch v. Treasurer & Receiver General*, 87.

If a resident of this Commonwealth at the time of his death owns shares of capital stock in a railroad corporation incorporated in three other States in which it operates its railroad, each of such three other States has jurisdictional power to impose a succession tax upon the shares. *Ibid.*

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State and owning property in a third State, such shares are not, under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, "legally subject" to a succession tax in the third State, because that State has no jurisdictional power to levy the tax. *Ibid.*

And, even if such a tax is levied and paid in such State, there should not be any deduction by reason of such payment from the tax here imposed upon the shares by the provisions of the statute. *Ibid.*

In the absence of something to indicate inequality before the law, inevitable and general disproportion, or oppressiveness or discrimination, a succession tax imposed by another State within its jurisdictional powers upon shares of stock in a corporation there incorporated is a tax to which the shares there are "legally subject." *Ibid.*

Its amount therefore cannot be questioned in the computation of the tax to be imposed in this Commonwealth under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2. *Ibid.*

In this case in imposing a succession tax upon shares of the capital stock of a railroad corporation incorporated in Michigan, Illinois and Wisconsin, which were owned by a decedent domiciled in Massachusetts at the time of his death, a Probate Court of the State of Michigan computed the tax as though the corporation were incorporated solely in Michigan and it was held that that tax was a succession tax to which the shares were "legally

subject" in Michigan and that its amount should be considered in computing the succession tax due in this Commonwealth. *Welch v. Treasurer & Receiver General*, 87.

Dividend.

It seems, that, where a corporation holds shares of another corporation as a part of the corporate property used in its business but does not permanently capitalize the shares, such shares are available for distribution in a dividend of surplus profits when no longer needed as "floating capital." *Gray v. Hemenway*, 293.

Dividend of the above described character which was held to be income in the hands of a trustee. *Ibid.*

Use of Certificates and Returns to State Officers as Evidence.

Since the enactment of St. 1903, c. 437, § 48, a return made by a domestic business corporation to the tax commissioner is not admissible in evidence at a hearing upon a petition by the corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner. *Brackett v. Commonwealth*, 119.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner. *Ibid.*

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to the leasehold interest. *Ibid.*

CORRUPT PRACTICES.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is unconstitutional. *Dinan v. Swig*, 516.

COUNTY.

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, relating to the giving of preference in public works to citizens of the Commonwealth, do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. *Lee v. Lynn*, 109.

COVENANT.

Construction of covenant in lease, see appropriate subtitle under LANDLORD AND TENANT.

CUSTOM.

Customary conduct of employees, known to their employer, which was held to make ineffectual a rule of the employer which the conduct violated. *Von Ette's Case*, 56.

DAMAGES.

For Property taken or impaired under Statutory Authority.

Commissioners appointed upon a petition under St. 1911, c. 439, for the assessment of damages caused by the construction of the drawless bridge over the Charles River called "Anderson," or "Stadium Bridge," were held to be officers of the Supreme Judicial Court by whom they were appointed. *Brackett v. Commonwealth*, 119.

That court therefore had the power and was charged with the duty of enforcing the report of such commissioners if it was according to the law and ought to be enforced. *Ibid.*

Therefore the Superior Court has no jurisdiction over the petitions filed in that court, the remedy afforded by St. 1911, c. 439, being sufficient and exclusive. *Ibid.*

The provision, that "the decision of said commissioners as to the amount of said damages and as to questions of fact involved shall be final," raises the implication that in other respects their decision is not final and that questions of law raised in the report may be reviewed. *Ibid.*

While this court would review the report of the commissioners the report would not be set aside nor would the case be sent back for rehearing unless there appeared to be some probability that an appreciable change would be made in the report by a correction of the mistakes, if any there were, and unless substantial justice required that course. *Ibid.*

At a hearing before the commissioners on such a petition it is proper for the commissioners to exclude a question asked the petitioner on his cross-examination in regard to the profits of his business, such profits being too remote to have any necessary bearing upon the issue of the injury to his leasehold interest. *Ibid.*

At such a hearing it is proper to exclude statements made to an assessor as to the value of the petitioner's real estate by one who was a director, the clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager, where it does not appear that these officers were authorized by the corporation to speak for it on that subject or that such statements were within the scope of their official duty. *Ibid.*

At such a hearing the fact, that the petitioning corporation paid taxes upon the same valuation of its real estate after the construction of the bridge that was alleged to have injured its property that it paid upon before the bridge was constructed, is not an admission by the petitioner that there had been no change in value, such valuation being that of the assessors and not of the petitioner. *Ibid.*

Nor is the failure of the petitioner to claim an abatement such an admission. *Ibid.*

An owner and a lessee of the same real estate abutting on the Charles River should bring separate petitions under the statute for the assessment of damages. *Ibid.*

The only damage which the owner of such leased property can recover is that sustained by the part of the whole property which is left after deducting from it the value of the lessee's interest, and the duty of the commissioners is to find separately the damages suffered by each petitioner. *Ibid.*

Since the enactment of St. 1903, c. 437, § 48, a return made by a domestic business corporation to the tax commissioner is not admissible in evidence at a hearing upon a petition by the corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner. *Brackett v. Commonwealth*, 119.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner. *Ibid.*

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to his leasehold interest. *Ibid.*

A petition to assess damages for land taken by the street commissioners of the city of Boston under St. 1909, c. 486, § 31, by a taking originally invalid which afterwards was made valid by the confirmatory statute St. 1914, c. 569, can be filed only in the county of Suffolk, and such a petition filed in the county of Middlesex must be dismissed. *N. Ward Co. v. Boston*, 367.

Indemnity for Loss and Expense due to Taking which has been abandoned or declared Void.

Under the provision of the highway act contained in the last clause of R. L. c. 48, § 13, one, who opposed before the county commissioners the granting of a petition to lay out a highway across his land, and, after the petition was granted by the county commissioners, filed and successfully maintained a petition for a writ of certiorari to quash the order for the laying out, is not entitled to be indemnified for counsel fees and other expenses and for loss of time incurred in relation to these matters. *Main v. County of Plymouth*, 66.

For Breach of Contract.

In an action for breach of contract to pay the plaintiff \$1,000 if she would make a home for the defendant, it also was held that the defendant, having failed to make any provision in the contract for the contingency of his marrying again and leaving the house of his son in a short time, was liable to the plaintiff for the full amount of \$1,000 which he had agreed to pay her. *St. John v. St. John*, 137.

In a suit in equity, in which the only material question came to be whether the defendant was liable in damages and, if so, for what amount for failing to carry out the terms of a contract to supply a sum of money to a certain corporation for a particular purpose, it was held that it had not been shown that the plaintiff had suffered any damage from the defendant's failure to carry out the terms of his contract, it being probable that, if he had complied strictly with his agreement, the plant would have been closed down for lack of working capital; and accordingly the bill was dismissed. *New England Iron Works Co. v. Jacot*, 216.

In an action upon a covenant in a lease for the rent of a store, the defendant was held not to be entitled to recoup substantial damages for the breach by the plaintiff, the lessor, of a covenant in the lease by which he agreed not to sell neckties or underwear during the term of the lease, because the only

Damages (continued).

damages which resulted from the breach were to a corporation, which occupied the premises, of which the defendant was the principal stockholder and manager and to which he had transferred all his business, although the relation of the lessee to the corporation was known to the lessor when the lease was made. *Thresher v. Simpson*, 349.

If, at the trial of an action of contract for breach of a contract of employment, it appears that at a certain time after his discharge from his employment the plaintiff became ill and physically unable to do the work which he had performed for the city, he is limited in his recovery to the amount of his salary from the date of his discharge to the date of such physical incapacity. *Tucker v. Boston*, 478.

In assessing damages for the breach of a contract to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, it was held that the plaintiff's loss of profit and the freight charges paid by him properly might be included. *Homer v. Baker Yacht Basin, Inc.* 500.

In Tort.

New trial in an action of tort was ordered limited to the issue of damages. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

All damages resulting to a person from personal injuries due to the negligence of another person should be recovered in one action. Two separate actions cannot be maintained by the same plaintiff, one for suffering and another for expenses incurred for medicine, nursing, care, and medical and surgical attendance caused by the same injury. *Cole v. Bay State Street Railway*, 442.

Evidence at the trial of an action by a woman against a corporation operating street and elevated railways for personal injuries, where it appeared that the plaintiff at most was but slightly bruised, was held to warrant a finding that the injuries received by the plaintiff were not wholly mental, but were physical injuries for which she was entitled to recover damages together with damages for mental suffering that arose out of or accompanied such physical injuries. *McCarthy v. Boston Elevated Railway*, 568.

A general averment of damages in the declaration in such an action is sufficient to cover the proof of physical and mental suffering of the plaintiff based upon permanent injury, a claim for permanent injury not being a matter of special damage. *Ibid.*

On evidence at the trial of the above action as to hysteria suffered by the plaintiff it was held that there was evidence warranting a finding that the plaintiff was injured permanently. *Ibid.*

In Equity.

In a suit in equity, in which the only material question came to be whether the defendant was liable in damages and, if so, for what amount for failing to carry out the terms of a contract to supply a sum of money to a certain corporation for a particular purpose, it was held that it had not been shown that the plaintiff had suffered any damage from the defendant's failure to carry out the terms of his contract, it being probable that, if he had complied strictly with his agreement, the plant would have been closed down for lack of working capital; and accordingly the bill was dismissed. *New England Iron Works Co. v. Jacot*, 216.

In Recoupment.

In an action upon a covenant in a lease for the rent of a store, the defendant was held not to be entitled to recoup substantial damages for the breach by the plaintiff, the lessor, of a covenant in the lease by which he agreed not to sell neckties or underwear during the term of the lease, because the only damages which resulted from the breach were to a corporation, which occupied the premises, of which the defendant was the principal stockholder and manager and to which he had transferred all his business, although the relation of the lessee to the corporation was known to the lessor when the lease was made. *Thresher v. Simpson*, 349.

DEATH.

Evidence, at the trial of an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a man sixty-six years of age, was held to warrant a finding that the death was caused by the accident although there was evidence that at the time of his injury he was subject to periodical attacks of gall bladder disease and that the immediate cause of his death was blood poisoning resulting from the condition of the gall bladder. *Walker v. Gage*, 179.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

On a petition to vacate a decree of the Probate Court which had been made more than twelve years before the filing of the petition and which was based on the fact that the petitioner had died more than seven years before that time and which ordered the distribution of a fund that had been deposited in a savings bank for his benefit, it was held that under the circumstances the decree must be vacated and a decree entered establishing the petitioner's right to the fund, but that no liability should be imposed upon the savings bank. *Jones v. Jones*, 540.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death*.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

DEED.

The right to the enforcement of an equitable restriction for the benefit of a lot of land is appurtenant to the land and passes under a deed that conveys the land "together with . . . all the rights, privileges and appurtenances thereto belonging," without any specific mention of the restriction. *Hart v. Rueter*, 207.

In a suit in equity to enforce an alleged equitable restriction requiring a set back from two streets, it was held that, in determining what was the restriction upon the defendant's land, the language of the deed to the defendant's predecessor in title from the common grantor of the plaintiff and the defendant and a plan with lines, some named and some not, must be considered together, and that the defendant was bound by a line on the plan which was

Deed (*continued*).

not named but which was held to require a set back of fifteen feet. *Oliver v. Kalick*, 252.

Construction of a trust created by deed. *Watson v. Watson*, 425.

In an action of contract against a corporation to recover compensation for the damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it was held that under the easement and a contract contained in a deed the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

DENTIST.

It seems, that the practice of dentistry, which depends for its success on personal qualities and professional skill, has no good will that arises merely from the place where it is carried on. *Wightman v. Wightman*, 398.

Instance of the termination by the insanity of a dentist of the relation of master and servant between him and his brother who was carrying on his business for him. *Ibid.*

In a suit in equity for an accounting, brought by a dentist against his brother, who, although not bound to do so, had carried on the plaintiff's business for him and on his account for a certain length of time while the plaintiff was insane, it was held that the defendant must account to the plaintiff for his profits during this period. *Ibid.*

In the same suit it also was held that the defendant was not bound to continue this relation indefinitely and had a right to carry on the practice of dentistry on his own account, paying the plaintiff for any of the plaintiff's machinery, tools and furniture of which he made use, and accordingly that the period for which the defendant was bound to account to the plaintiff for his profits ended when the defendant ceased to carry on the work of the office for the benefit and on account of the plaintiff. *Ibid.*

DEVISE AND LEGACY.

Vested Interest.

Upon the construction of the provisions of the residuary clause of a will creating a trust, it was held that the testator's daughter took a vested estate in one half of the principal of the trust fund, which was to come to her upon the termination of the trust, subject to be divested by the happening of certain contingencies which did not occur, and that her son upon the termination of the trust took this half of the trust fund as her heir at law and next of kin. *Hall v. Beebe*, 306.

What Estate.

A gift by will to the testator's wife of the use of and income from all of his estate, accompanied by a provision that, if the income in her judgment should be insufficient for her support, comfort and enjoyment, "or for any other purpose for which she may wish to spend money," she should have power to sell "any of my estate, real, personal and mixed," and to spend the pro-

ceeds for such purposes, was held to be a life estate, so that an inheritance tax due to the Commonwealth should be computed accordingly. *Kemp v. Kemp*, 32.

Specific Legacy.

A legacy of a certain mortgage note to the owner of the mortgaged property, accompanied by an instruction to the executor of the will to discharge the mortgage securing the note, is a specific legacy of the note. *O'Neil v. Cogswell*, 364.

Ademption.

Evidence as to the conduct of a widow who, as the administratrix of the estate of her husband, came into possession, as a part of the assets of his estate, of a certain mortgage and the note secured thereby, which was payable to a former holder of the mortgage and by him had been indorsed in blank, including the making of a provision in her will for a specific legacy of the mortgage note to the owner of the real estate and instructing the executor of the will to discharge the mortgage, was held not to warrant a finding that she owned the note and mortgage at the time of her death, so that nothing passed by the specific legacy. *O'Neil v. Cogswell*, 364.

Intention as to Postponement of Payment.

Language of a certain will was held not to disclose an intention of the testator to postpone the payments of the legacies more than one year from his death. *Gilbert v. Bachelder*, 329.

And therefore one, who was given a legacy by such a will and whose entire legacy was not paid for more than a year after the testator's death although the value of the estate warranted a payment within the year, is entitled to be paid interest at six per cent on any unpaid balances from the expiration of one year from the testator's death. *Ibid.*

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICIL.

If, in a case where the domicile or legal residence of a man is material, it appears that his domicile by birth was in a certain county in this Commonwealth, that he married there and lived there with his wife, and that later when he had been absent he made frequent visits to his wife who continued to live in the house that they had lived in together, a finding is justified that he retained his domicile in that place. *Sampson v. Sampson*, 451.

In a finding of a trial judge that the libellant in a suit for divorce "lived there [in Springfield] during a part of the summer and fall of 1912" and a further finding that the domicile of the libellant at that time was in Westport, the word "lived" is used in the sense of subsisted and does not relate to legal residence. *Ibid.*

DRAIN.

Suits against municipal corporations for relief from and for damages resulting from the overflowing of surface drainage systems, see MUNICIPAL CORPORATIONS, *Surface Drainage*.

EASEMENT.

Construction of an easement of light and air in a deed of a lot of land, which when conveyed was twenty feet wide on a city street and twenty-nine feet deep, where the words of the deed granted "the privilege of putting two or three windows on the north side of each dwelling house which may be built on said premises." *Kessler v. Bowditch*, 265.

In an action of contract against a corporation to recover compensation for the damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it was held that under the easement and a contract contained in a deed the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

Where for a period of more than twenty years the roof of a building openly and conspicuously had extended four feet over the adjoining land, causing water to drip and snow and ice to fall thereon, under the circumstances it was held that a bill in equity by the owner of the servient estate to restrain the owner of the dominant estate from permitting the roof to project over the plaintiff's premises must be dismissed. *Matthys v. First Swedish Baptist Church of Boston*, 544.

ELECTION.

Where, in a suit in equity, it appeared that an action at law for the same cause was pending, it was held that the court instead of dismissing the bill outright by reason of the pendency of such an action, would give the plaintiff a chance to elect whether he would proceed at law or in equity, and would order in substance that the bill be dismissed unless within a reasonable time the plaintiff discontinued his action at law. *Spear v. Coggan*, 156.

ELECTIONS.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is contrary to c. 1, § 3, art. 10, of the Constitution, which provides that "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members," and also to art. 30 of the Declaration of Rights, which declares the separation of the legislative and judicial departments of the government. *Dinan v. Swig*, 516.

ELEVATOR.

If a milk dealer employs a servant to deliver milk on premises not belonging to the employer or within his control, and such servant is injured by falling

down an elevator well in a building to which he was sent by his employer to deliver milk, the servant can recover from his employer for such injuries only by showing that the place was dangerous and that the employer had knowledge or reason to know of the danger and reason to believe that the servant was ignorant of it. *Walsh v. Turner Centre Dairying Association*, 386.

EMINENT DOMAIN.

A petition to assess damages for land taken by the street commissioners of the city of Boston under St. 1909, c. 486, § 31, by a taking originally invalid which afterwards was made valid by the confirmatory statute St. 1914, c. 569, can be filed only in the county of Suffolk, and such a petition filed in the county of Middlesex must be dismissed. *N. Ward Co. v. Boston*, 367.

Assessment of damages for property taken or impaired under statutory authority, see appropriate subtitle under DAMAGES.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.

See also WORKMEN'S COMPENSATION ACT.

EQUITABLE RESTRICTIONS.

On certain land at Nantasket Beach. *Hobart v. Weston*, 161.

Where equitable restrictions were imposed upon thirteen lots of land according to a general plan for the development of an entire tract, the fact, that the restrictions imposed upon three of the lots differed somewhat from the uniform restrictions imposed on the other ten lots, was held not to affect the character of the restrictions on the other ten lots nor to render such restrictions less binding. *Hartt v. Rueter*, 207.

A finding of a judge of the Land Court that the porte-cochère of the house on the respondent's premises extends over, or into, the restricted area, in the absence of a finding that the structure was built and maintained in violation of the restriction, was held not to require a ruling that as matter of law its existence constituted a violation of an equitable restriction imposed upon lots adjoining a private street which required "that no building shall be placed nearer to said principal avenue than twenty-five feet." *Ibid.*

A right to the enforcement of an equitable restriction for the benefit of a lot of land is appurtenant to the land and passes under a deed that conveys the land "together with . . . all the rights, privileges and appurtenances thereto belonging," without any specific mention of the restriction. *Ibid.*

It cannot be found that the right to enforce an equitable restriction has been abandoned or relinquished, where no adverse use is established and where there is no evidence of any act of the owner of the land to which the right to enforce the restriction is appurtenant unequivocally manifesting either a present intention to relinquish the restriction or a purpose inconsistent with its further existence. *Ibid.*

In a suit in equity to enforce an alleged equitable restriction requiring a set

Equitable Restrictions (continued).

back from two streets, it was held that, in determining what was the restriction upon the defendant's land, the language of the deed to the defendant's predecessor in title from the common grantor of the plaintiff and the defendant and a plan with lines, some named and some not, must be considered together, and that the defendant was bound by a line on the plan which was not named but which was held to require a set back of fifteen feet. *Oliver v. Kalick*, 252.

In a suit in equity to enforce an equitable restriction alleged to have been imposed on the defendant's land, if the alleged restriction is not contained in the defendant's deed nor in those of any of his predecessors in title and the deeds refer to a plan filed in the registry of deeds on which there is no indication of any restriction, the restriction cannot be imposed upon the land by oral evidence of an alleged intention on the part of the original grantor who divided a large tract of land into lots and filed a plan of them in the registry of deeds. *Sargent v. Leonardi*, 556.

It does not help the plaintiff in such a suit to undertake to show that the alleged restriction was omitted from the defendant's deed by accident or mistake, the remedy to correct such a mistake, if there was one, being by a bill to reform the deed. *Ibid.*

In such a suit a recital in a mortgage given by the owner of the part of the lot not owned by the defendant, stating mistakenly that the mortgagor's land is subject to the restriction in question, does not create such a restriction even upon his own land, still less on the land of the defendant. *Ibid.*

In the above suit it was said that it was unnecessary to consider whether the statute of frauds would be a bar to the relief sought by the plaintiff. *Ibid.*

EQUITY JURISDICTION.

Motive for Bringing Suit.

Improper motives actuating the plaintiff, which prevented him from being awarded costs. *Corkery v. Dorsey*, 97.

Premature Suit.

Suit for an accounting which was held to have been brought prematurely. *Bradley v. Borden*, 575.

Laches.

A petition to intervene, filed by a creditor in a suit in equity seven and one half years after an interlocutory decree in the suit had ordered that certain specified property should be transferred to a trustee named, "in trust, to pay all present just debts, charges and expenses, of said E. R.," was held not to disclose laches that would bar the petitioner's claim, as it did not appear that any one other than the petitioner had been harmed by his delay in filing his petition. *Rice v. Merrill*, 279.

Statute of Limitations.

Upon construction of a trust created by an interlocutory decree in equity ordering that certain specified property should be transferred to a trustee

"in trust, to pay all present just debts, charges and expenses, of said E. R.," it was held that a petition to intervene in the suit filed seven and one half years after the decree was made by an alleged creditor of E. R., was not barred by the statute of limitations because the statute did not begin to run in favor of the trustee unless and until the trust was repudiated by him. *Rice v. Merrill*, 279.

Defence of Pendency of Action at Law.

In a suit in equity against an administrator upon the termination of a trust to compel an accounting and the payment of the trust fund to the parties entitled to it, it is a defence that the plaintiff has brought an action of law against the defendant for the same cause of action which still is pending. *Spear v. Coggan*, 156.

But the court of equity, instead of dismissing the bill outright by reason of the pendency of such an action, will give the plaintiff a chance to elect whether he will proceed at law or in equity, and will order in substance that the bill be dismissed unless within a reasonable time the plaintiff shall discontinue his action at law. *Ibid*.

Offer to Return as Prerequisite to Rescission.

Where in an intervening petition in a suit in equity setting forth a claim, against a fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [petitioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30. *Rice v. Merrill*, 279.

Intervening Petition.

A petition to intervene, filed by a creditor in a suit in equity seven and one half years after an interlocutory decree in the suit had ordered that certain specified property should be transferred to a trustee named, "in trust, to pay all present just debts, charges and expenses, of said E. R.," was held not to disclose laches that would bar the petitioner's claim, as it did not appear that any one other than the petitioner had been barred by his delay in filing his petition. *Rice v. Merrill*, 279.

Where in such an intervening petition setting forth a claim, against a fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [the petitioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30. *Ibid*.

To enforce Rights under Syndicate Agreements.

See SYNDICATE.

To relieve from Fraud.

The decision of this court at a previous stage of this case reported in 222 Mass. 156, to the effect that certain acts of a creditor were a fraud upon the law, so that the trustee in bankruptcy in a suit in equity against such creditor could recover the value of certain accounts assigned to the creditor without returning the money received for such accounts by the bankrupt, was affirmed. *Rubenstein v. Lottow*, 227.

Mistake.

It does not help the plaintiff in a suit in equity to enforce an alleged equitable restriction not contained in the defendant's deed nor in those of any of his predecessors in title, to undertake to show that the alleged restriction was omitted from the defendant's deed by accident or mistake, the remedy to correct such a mistake, if there was one, being by a bill to reform the deed. *Sargent v. Leonardi*, 556.

For an Accounting.

In a suit in equity against an administrator upon the termination of a trust to compel an accounting and the payment of the trust fund to the parties entitled to it, it is a defence that the plaintiff has brought an action of law against the defendant for the same cause of action which still is pending. *Spear v. Cogan*, 156.

But the court of equity, instead of dismissing the bill outright by reason of the pendency of such an action, will give the plaintiff a chance to elect whether he will proceed at law or in equity, and will order in substance that the bill be dismissed unless within a reasonable time the plaintiff shall discontinue his action at law. *Ibid*.

Where a lessee under a ten year lease deposited with a third person as trustee the sum of \$3,000 as security for the payment of the rent under the lease, it was held, in a suit in equity by the lessee against the trustee for an accounting, that the defendant, who had held the fund deposited with him upon an express trust and had invested it, was bound to account to the plaintiff for the interest earned. *Thompson v. Knapp*, 277.

In a suit in equity for an accounting, brought by a dentist against his brother, who, although not bound to do so, had carried on the plaintiff's business for him and on his account for a certain length of time while the plaintiff was insane, it was held that the defendant must account to the plaintiff for his profits during this period. *Wightman v. Wightman*, 398.

In the same suit it also was held that the defendant was not bound to continue this relation indefinitely and had a right to carry on the practice of dentistry on his own account, paying the plaintiff for any of the plaintiff's machinery, tools and furniture of which he made use, and accordingly that the period for which the defendant was bound to account to the plaintiff for his profits ended when the defendant ceased to carry on the work of the office for the benefit and on account of the plaintiff. *Ibid*.

A suit in equity, filed three days after the expiration of the time of termination provided for in a syndicate agreement, praying for a winding up of the syndicate and the distribution of its property among the subscribers, was held to have been brought prematurely because a master found "that a

reasonable time for winding up the affairs of the syndicate, after the time when it terminated by the terms of the agreement, was one month after" the day of termination. *Bradley v. Borden*, 575.

Accounting between Partners.

Where four years after a settlement between two partners, one a business man who had had "charge of the business management" and the other a lawyer who had agreed to "manage the legal end of the enterprise and advise with" his partner, the business man for the first time learned that the lawyer had "purposely refrained" from bringing to the business partner's attention certain matters affecting their joint interest but benefiting the lawyer, it was held that the business partner might maintain a bill in equity against the lawyer partner for an accounting. *Arnold v. Maxwell*, 47.

In such suit, where it appeared that the parties could not be restored to the position they were in when the settlement was made, it was held that the defendant was chargeable in a partnership accounting on the basis of the agreement of equality as of the date of the settlement. *Ibid*.

In a suit in equity for an accounting between the plaintiff and the defendant for carrying on as copartners a cigar, tobacco and confectionery business, it was held that under the circumstances the plaintiff was entitled to share in the net value at the time of the termination of the partnership of a lease, obtained by the defendant from a city and claimed by the defendant as his sole property, in excess of the rent reserved. *Deutschman v. Dwyer*, 281.

Trusts.

See TRUST.

To enforce Easement of Light and Air.

Suit in equity to enforce an easement of light and air in a deed of a lot of land, which when conveyed was twenty feet wide on a city street and twenty-nine feet deep, where the words of the deed granted "the privilege of putting two or three windows on the north side of each dwelling house which may be built on said premises." *Kessler v. Bowditch*, 285.

To enforce Equitable Restrictions.

Construction of a deed and a plan with building lines in a suit to enforce an equitable restriction requiring a set back from streets. *Oliver v. Kalick*, 252.

In a suit in equity to enforce an equitable restriction not contained in the defendant's deed nor in those of any of his predecessors in title nor on any recorded plan referred to in the deeds, the restriction cannot be imposed upon the land by oral evidence of an alleged intention on the part of the original grantor who divided a large tract of land into lots and filed a plan of them in the registry of deeds. *Sargent v. Leonardi*, 556.

In such a suit a recital in a mortgage given by the owner of the part of the lot not owned by the defendant, stating mistakenly that the mortgagor's land is subject to the restriction in question, does not create such a restriction even upon his own land, still less on the land of the defendant. *Ibid*.

Equity Jurisdiction (continued).

It does not help the plaintiff in such a suit to undertake to show that the alleged restriction was omitted from the defendant's deed by accident or mistake, the remedy to correct such a mistake, if there was one, being by a bill to reform the deed. *Sargent v. Leonardi*, 556.

In the above suit it was said that it was unnecessary to consider whether the statute of frauds would be a bar to the relief sought by the plaintiff. *Ibid*.

For Establishment of Debt against Estate barred by Short Statute of Limitations.

Under the circumstances which appeared in a suit in equity under R. L. c. 141, § 10, against an administrator to establish a debt alleged to be due to the plaintiff which was barred under § 9 of that chapter because no suit for its collection had been commenced within two years from the time when the administrator gave his bond, it was held that a finding was warranted that the plaintiff had been guilty of "culpable neglect," which under the provisions of the statute was a bar to the suit. *Estabrook v. Moulton*, 359.

To reach and apply Equitable Assets.

The interest under an insurance policy of one insured by a contract of fire insurance on a building in the Massachusetts standard form, after the destruction of the building by fire but before the insurance company has elected whether it will pay the loss or will rebuild the building, is property which can be reached and applied in a suit in equity under R. L. c. 159, § 3, cl. 7, in satisfaction of a debt of the insured. *Levenstein v. Forman*, 325.

To set aside Conveyance fraudulent as to Creditors.

The fact that a conveyance was fraudulent as to creditors is no ground for avoiding it between the parties. *Pollock v. Pollock*, 382.

To enjoin Action at Law.

In a suit in equity by a mortgagor of real estate to enjoin the mortgagee from suing the plaintiff for the balance due on the mortgage note after applying toward its payment the proceeds of a foreclosure sale, where the plaintiff has alleged that the sale was not conducted fairly and in good faith and that if it had been so conducted the proceeds would have been more than sufficient to pay the note in full, the burden rests upon the plaintiff to prove these allegations. *Taylor v. Weingartner*, 243.

Mere facts, that the mortgagee of real estate was the only bidder at a foreclosure sale and that the property brought less than its market value, were held not to make the sale invalid nor afford ground to the original mortgagor for maintaining a suit in equity against the mortgagee to enjoin him from suing for the balance due on the mortgage note after applying toward its payment the proceeds of the sale. *Ibid*.

To enjoin Continuing Trespass.

Where for a period of more than twenty years the roof of a building openly and conspicuously had extended four feet over the adjoining land, causing water to drip and snow and ice to fall thereon, under the circumstances it was held

that a bill in equity by the owner of the servient estate to restrain the owner of the dominant estate from permitting the roof to project over the plaintiff's premises must be dismissed. *Matthys. v. First Swedish Baptist Church of Boston*, 544.

To enjoin Nuisance.

In a suit in equity against a manufacturer of mattresses to restrain him from maintaining an alleged nuisance in the operation of his factory to the alleged injury of the plaintiff and his family by noise and the vibration of the plaintiff's dwelling house, it was held that a finding of a master, that the defendant was committing no nuisance in the operation of the machinery of his factory and that the plaintiff was not entitled to relief, could not be said as matter of law to be wrong. *Cremidas v. Fenton*, 249.

To enjoin Removal of Remains from Cemetery.

Bill in equity to enjoin the proprietor of a cemetery from removing remains from a certain lot was dismissed because the license to use the lot was revocable upon failure of the certificate holder to comply with certain conditions which were not fulfilled. *Green v. Danahy*, 1.

To restrain Municipality from causing Water to overflow from Surface Drain.

One, whose land is damaged by water overflowing upon it from a highway in a city by reason of the arrangements made by the surveyor of highways of the city for the disposal of surface water at a street junction adjoining the land, cannot maintain a suit in equity against the city for an injunction or for damages. *Dupuis v. Fall River*, 73.

To enjoin Use of Trade Name and Symbols.

A suit in equity to enjoin the use of a retail trade name and symbols of the plaintiff cannot be maintained where it does not appear that the territory in which the defendant used the trade name and symbols was one to which the plaintiff's trade extended. *Kaufman v. Kaufman*, 104.

Under Small Loans Act.

Although under the small loans act notes given in violation of its provisions are declared by St. 1911, c. 727, § 17, as amended by St. 1912, c. 675, § 5, to be void, and the amount of any unlawful interest paid upon them may be recovered back in an action at law, a remedy in equity also is given expressly by St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4. *Thomas v. Burnce*, 311.

In a suit in equity under St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4, to recover the amount of unlawful interest paid on notes made void by the small loans act, where the bill prayed for an accounting, it was held that it was not necessary for the bill to contain an offer to pay the defendant any amount that might be found to be due to him upon the accounting prayed for, and that the omission of such an offer was no ground of demurrer. *Ibid.*

Damages.

In a suit in equity, in which the only material question came to be whether the defendant was liable in damages and, if so, for what amount for failing to carry out the terms of a contract to supply a sum of money to a certain corporation for a particular purpose, it was held that it had not been shown that the plaintiff had suffered any damage from the defendant's failure to carry out the terms of his contract, it being probable that, if he had complied strictly with his agreement, the plant would have been closed down for lack of working capital; and accordingly the bill was dismissed. *New England Iron Works Co. v. Jacot*, 216.

EQUITY PLEADING AND PRACTICE.

Parties.

One, to whom an unexpended balance of a spendthrift trust fund might be paid at the death of a life beneficiary in case she had not disposed of it by her will according to a power given to her by the trust instrument, has a right, in no way depending upon the discretion of the court, to maintain a suit in equity to set aside an improper payment of the fund by the trustee to the life beneficiary irrespective of what motives actuate him in the institution of the suit. *Corkery v. Dorsey*, 97.

Bill.

In a suit in equity under St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4, to recover the amount of unlawful interest paid on notes made void by the small loans act, where the bill prayed for an accounting, it was held that it was not necessary for the bill to contain an offer to pay the defendant any amount that might be found to be due to him upon the accounting prayed for, and that the omission of such an offer was no ground of demurrer. *Thomas v. Burnce*, 311.

In such a suit in equity to recover back unlawful interest paid on void notes, where the allegations in the plaintiff's bill were somewhat vague and informally stated, it was held that the facts intended to be relied upon were stated with sufficient clearness to allege proper grounds for relief. *Ibid.*

Amendment.

The provisions of R. L. c. 173, § 52, empowering the Supreme Judicial Court or the Superior Court to allow amendments changing a suit in equity into an action at law or an action at law into a suit in equity "upon terms," do not require that, in granting such a motion, costs shall be imposed upon the moving party. *Lewenstein v. Forman*, 325.

The imposition of costs in such cases still is left, under R. L. c. 203, § 14, and Equity Rules 12 and 21, within the discretion of the court and such an amendment may be allowed without costs. *Ibid.*

Reference to Master.

Where a suit in equity is referred to a master with an order to report his findings of fact and rulings of law, his report of rulings of law is advisory. *Bradley v. Borden*, 575.

Where by consent of the parties a suit in equity is referred to a master "to hear the parties and their evidence, to find the facts, decide the case, and report thereon to the court," the master has authority to report not only his findings of fact but also his rulings of law. *Ibid.*

Where a master appointed under the rule quoted above ruled that he thereby was directed "to determine matters of law as well as matters of fact, and to make such findings as would have been made by a justice of this court had the case been heard by the court," it was held that, although the statement of the master was not strictly accurate, it was essentially correct and that the objecting party was not harmed by it, so that a denial of the motion to recommit based on the master's alleged error was right whether considered as a matter of discretion or as a matter of law. *Ibid.*

Requests for Rulings at Hearing before Master.

A master is justified in his discretion in refusing to consider requests for rulings which were presented to him for the first time more than a month after his draft report had been submitted to the parties and within the five days following the submission to counsel of the final draft of his report during which by Equity Rule 31 formal objections may be filed with him as the basis of exceptions to the report. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

Master's Report.

Incompleteness of a master's report is a proper ground for a motion to recommit the report, but it is not a proper subject of an exception to the report. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

The discretion of a judge who, after the filing of a master's report, heard and denied motions of the plaintiff to recommit the report, to vacate the report and commit the case to another master, to report the evidence, to strike out certain portions of the draft report, and for a further hearing, was held not to have been exercised wrongly. *Ibid.*

Exceptions to Master's Report.

An exception to a finding of fact by a master which is not inconsistent with other findings in his report will be overruled if the evidence upon which the finding was made is not reported. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

Incompleteness of a master's report is a proper ground for a motion to recommit the report, but it is not a proper subject of an exception to the report. *Ibid.*

Motion to Recommend Master's Report.

The discretion of a judge who, after the filing of a master's report, heard and denied motions of the plaintiff to recommit the report, to vacate the report

Equity Pleading and Practice (*continued*).

and commit the case to another master, to report the evidence, to strike out certain portions of the draft report, and for a further hearing, was held not to have been exercised wrongly. *Cunningham v. Worcester Five Cents Savings Bank*, 361.

Incompleteness of a master's report is a proper ground for a motion to recommit the report. *Ibid*.

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Findings of Trial Judge.

On an appeal in equity, a finding and ruling of the trial judge can be sustained on a ground not adopted by him, and the fact that he stated a wrong reason is immaterial. *Putnam v. United States Trust Co.* 199.

Memorandum of Findings.

A memorandum of findings of fact, filed by a single justice of this court by whom a suit in equity was heard, is a part of the record of the case on appeal and is entitled to all the weight of a finding made under R. L. c. 159, § 23. *Corkery v. Dorsey*, 97.

Rules of Court.

Equity Rule 12. *Levenstein v. Forman*, 325.

Equity Rule 21. *Ibid*.

Decree.

Where, in a suit in equity, it appeared that an action at law for the same cause was pending, it was held that the court, instead of dismissing the bill outright by reason of the pendency of such an action, would give the plaintiff a chance to elect whether he would proceed at law or in equity, and would order in substance that the bill be dismissed unless within a reasonable time the plaintiff discontinued his action at law. *Spear v. Coggan*, 156.

Upon construction of a trust created by an interlocutory decree in equity ordering that certain specified property should be transferred to a trustee "in trust, to pay all present just debts, charges and expenses, of said E. R.," it was held that a petition to intervene in the suit filed seven years and a half after the decree was made by an alleged creditor of E. R., was not barred by the statute of limitations because the statute did not begin to run in favor of the trustee unless and until the trust was repudiated by him. *Rice v. Merrill*, 279.

On an appeal by the defendants from a decree ordering the specific performance of a contract to purchase certain hotel property from the plaintiff, entered by order of a judge of the Superior Court in pursuance of a rescript

stating a decision of this court, where the only question presented was whether the decree appealed from conformed to the rescript, it was held that the decree must be construed in the light of the findings of the master confirmed by the decision of this court, and that it was not open to the defendants to discuss any issue thus disposed of. *King v. Connors*, 305.

Appeal.

Under R. L. c. 159, § 19, amended by St. 1911, c. 284, § 1, one of two defendants in a suit in equity cannot appeal from a final decree which as to him orders that the bill be dismissed, he not being "a party who is aggrieved" by such decree. *Donovan v. Donovan*, 6.

And the above is true although the decree orders the co-defendant to pay a sum of money to the plaintiff, and the party attempting to appeal may be affected by the decree because he is a joint obligor with his co-defendant on a bond dissolving an injunction in the same suit. *Ibid*.

While there can be no appeal from a final decree or judgment entered substantially in accordance with a rescript of the full court of the Supreme Judicial Court and such an attempted appeal will be dismissed and the final decree or judgment will stand as if no appeal had been taken, if the form of the final decree or judgment ordered by the rescript is not embodied therein, examination of the subsequent record on appeal will be made in appropriate cases to ascertain whether it is in accordance with the rescript. *Boston, petitioner*, 36.

A memorandum of findings of fact, filed by a single justice of this court by whom a suit in equity was heard, is a part of the record of the case on appeal and is entitled to all the weight of a finding made under R. L. c. 159, § 23. *Corkery v. Dorsey*, 97.

On an appeal in equity, a finding and ruling of the trial judge can be sustained on a ground not adopted by him, and the fact that he stated a wrong reason is immaterial. *Putnam v. United States Trust Co.* 199.

On an appeal by the defendants from a decree ordering the specific performance of a contract to purchase certain hotel property from the plaintiff, entered by order of a judge of the Superior Court in pursuance of a rescript stating a decision of this court, where the only question presented was whether the decree appealed from conformed to the rescript, it was held that the decree must be construed in the light of the findings of the master confirmed by the decision of this court, and that it was not open to the defendants to discuss any issue thus disposed of. *King v. Connors*, 305.

It appearing in the case mentioned above that the only new matter in the decree was the requirement from the plaintiff of a bond to secure the defendants from any damages they might sustain by reason of the existence of a certain lease, it was held that this provision, which was inserted in the decree solely for the protection of the defendants, could give them no ground for complaint. *Ibid*.

Costs.

Improper motives actuating the plaintiff, which prevented him from being awarded costs. *Corkery v. Dorsey*, 97.

The provisions of R. L. c. 173, § 52, empowering the Supreme Judicial Court or the Superior Court to allow amendments changing a suit in equity into

Equity Pleading and Practice (continued).

an action at law or an action at law into a suit in equity "upon terms," do not require that, in granting such a motion, costs shall be imposed upon the moving party. *Lowenstein v. Forman*, 325.

The imposition of costs in such cases still is left, under R. L. c. 203, § 14, and Equity Rules 12 and 21, within the discretion of the court and such an amendment may be allowed without costs. *Ibid.*

Pleadings as Evidence.

In analogy to R. L. c. 173, § 85, which provides that in actions at law "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them," an allegation or denial in a bill in equity made by the plaintiff in his own favor and sworn to by him, although it is an admission of the truth of the fact stated, cannot be used by him as evidence. *Taylor v. Weingartner*, 243.

ESTOPPEL.

The mere fact, that the proprietor of a garage "at the time of replevin" of an automobile claims and demands payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, does not estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender. *Doody v. Collins*, 332.

EVIDENCE.

Matters of Common Knowledge.

The polity or mode of government of the Roman Catholic Church is not a matter of common knowledge. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

While a juror properly may apply his general knowledge and experience to the subject of inquiry and in determining the weight and credibility of the evidence, he is not permitted to act upon his private knowledge of particular facts which are not matters of common knowledge. *Ibid.*

It is a matter of common knowledge that street railway cars cannot be run at any considerable rate of speed without creating a current of air. *Selbedea v. Worcester Consolidated Street Railway*, 76.

Presumptions and Burden of Proof.

Applications of the doctrine, *res ipsa loquitur*. See appropriate subtitle under NEGLIGENCE.

A public use of land, when established, is presumed to continue unless its lawful extinguishment is shown affirmatively. *Eklon v. Chelsea*, 213.

An employee's ignorance of his rights and obligations under the workmen's compensation act does not excuse him from compliance with its requirements. *Pecott's Case*, 546.

Upon the hearing of exceptions by the defendant in an action against a cor-

poration operating a street railway for personal injuries alleged to have been caused by running down the plaintiff with a car of the defendant, the defendant's counsel in his brief suggested for the first time that there was no evidence that the defendant was operating the street railway on which the plaintiff was injured, but because upon plans put in evidence by the defendant the railway track was designated as the track of the defendant, it was held that, in the absence of any evidence to the contrary, this warranted a finding that the car which struck the plaintiff was operated by the defendant. *Brereton v. Milford & Uzbridge Street Railway*, 130.

Evidence at the trial of an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a man sixty-six years of age, was held to warrant a finding that the death was caused by the accident, although there was evidence that at the time of his injury he was subject to periodical attacks of gall bladder disease and that the immediate cause of his death was blood poisoning resulting from the condition of the gall bladder. *Walker v. Gage*, 179.

It cannot be found that the right to enforce an equitable restriction has been abandoned or relinquished, where no adverse use is established and where there is no evidence of any act of the owner of the land to which the right to enforce the restriction is appurtenant unequivocally manifesting either a present intention to relinquish the restriction or a purpose inconsistent with its further existence. *Hartt v. Rueter*, 207.

The use by a street railway corporation in a semi-convertible car of an iron threshold having guides a quarter of an inch high between which the door of the car slides, such thresholds having been in common use for a number of years on other street railway systems, combined with the fact that a woman passenger in leaving the car caught the heel of her boot between the iron guides and was injured, furnishes no evidence of negligence in an action by such passenger against the corporation for her injuries. *Perkins v. Bay State Street Railway*, 235.

In an action by an administrator against a corporation for personal injuries, if the defendant introduces a release of the cause of action executed by the intestate and the plaintiff admits its execution, merely denying that the words "I have read the above and agree to it" were written by the intestate, and if there is no evidence of illiteracy, mental incompetency, fraud, misrepresentation or coercion, a verdict must be ordered for the defendant. *LaCroix v. Boston Elevated Railway*, 242.

In a suit in equity by a mortgagor of real estate to enjoin the mortgagee from suing the plaintiff for the balance due on the mortgage note after applying toward its payment the proceeds of a foreclosure sale, where the plaintiff has alleged that the sale was not conducted fairly and in good faith and that if it had been so conducted the proceeds would have been more than sufficient to pay the note in full, the burden rests upon the plaintiff to prove these allegations. *Taylor v. Weingartner*, 243.

A judge of the Municipal Court of the City of Boston, at the trial before him of an action of contract, rightly may refuse to make a ruling that "Upon all the evidence the finding should be for the defendant," if there is evidence on which he can and does find for the plaintiff. *Wyche v. Uebelhoer*, 353.

Evidence as to the conduct of a widow who, as the administratrix of the estate of her husband, came into possession, as a part of the assets of his

Evidence (continued).

estate, of a certain mortgage and the note secured thereby, which was payable to a former holder of the mortgage and by him had been indorsed in blank, including the making of a provision in her will for a specific legacy of the mortgage note to the owner of the real estate and instructing the executor of the will to discharge the mortgage, was held not to warrant a finding that she owned the note and mortgage at the time of her death. *O'Neil v. Cogswell*, 364.

Where, at the trial of an action upon the probate bond of an administrator by a creditor of the estate of the intestate, the principal defendant admits that the plaintiff brought an action against him as administrator and recovered judgment for the debt and that the defendant failed to expose goods or estate to be taken in satisfaction thereof, and where it is not disputed that the amount of the judgment debt is larger than the penal sum of the bond with interest from the date of the writ, the trial judge in his discretion properly may order a verdict for the plaintiff in the penal sum of the bond with interest thereon from the date of the writ. *McIntire v. Conlan*, 389.

Evidence at the trial of an action against a contractor constructing a subway for personal injuries caused by the unguarded presence of a timber or plank on a sidewalk of a public street where such construction was going on, upon which it was held that the jury were warranted in finding that the plank was placed where it was by the servants of the defendant acting within the scope of their authority. *Murphy v. Hugh Nawn Contracting Co.* 404.

Where a party to an action has excepted to the admission of certain evidence, otherwise competent, on the ground that it tends to create a prejudice against him on a collateral issue, the burden is upon him to disclose in his bill of exceptions sufficient evidence to show that the evidence objected to by him was introduced in such a way or at such a time as to demonstrate its purpose to arouse prejudice. *Godfrey v. Old Colony Street Railway*, 419.

Where, at the trial of an action of tort against a street railway corporation for personal injuries alleged to have been received when a street car of the defendant suddenly started and caused the plaintiff, who was in the act of alighting, to be thrown to the street, there is direct and inferential evidence from which the findings are warranted that the car started in response to a starting signal and that such signal was not given by any one else than the conductor, a further finding is warranted that the signal was given by the conductor although there is no direct evidence to that effect. *Fitzpatrick v. Boston Elevated Railway*, 475.

On the evidence at the trial of an action against the owner and driver of an automobile by a boy who, after the enactment of St. 1914, c. 553, when twelve years of age and while playing at rolling a hoop on a public way in a city, was run into from behind by the automobile, it was held that it could not be ruled as a matter of law that the defendant had overcome the presumption of due care of the plaintiff raised by St. 1914, c. 553. *Patrick v. Deziel*, 505.

In an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube it was held that the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury. *Souden v. Fore River Ship Building Co.* 509.

Evidence as to the execution and attestation of an instrument purporting

to be the last will of one who had been "an old fashioned country lawyer — a squire" where two of the three persons named as witnesses had died before the instrument was presented for probate and the surviving witness testified that he did not remember seeing the alleged testator sign the will, was held to warrant an inference that the will was executed by the testator in the presence of the three witnesses before it was subscribed by them and that its execution and attestation were complete and valid under R. L. c. 135, § 1. *Pratt v. Dalby*, 559.

Inferences.

From certain facts as to the use of a widely advertised trade name and symbols by a retail dealer in hats, in forty-one stores in nine different States, including Greater New York, Providence and Boston, it was held that it could not be inferred that a market for his hats, sufficient to give him the exclusive right to the use therein of his trade name and symbols, reached to Worcester or to Woonsocket in Rhode Island or to New Haven in Connecticut. *Kaufman v. Kaufman*, 104.

Matters of Conjecture.

In an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube it was held that the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury. *Souden v. Fore River Ship Building Co.* 509.

Admissions.

Since the enactment of St. 1903, c. 437, § 48, a return made by a domestic business corporation to the tax commissioner is not admissible in evidence at a hearing upon a petition by the corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner. *Brackett v. Commonwealth*, 119.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner. *Ibid.*

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to the leasehold interest. *Ibid.*

At such a hearing it is proper to exclude statements made to an assessor as to the value of the petitioner's real estate by one who was a director, the clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager, where it does not appear that these officers were authorized by the corporation to speak for it on that subject or that such statements were within the scope of their official duty. *Ibid.*

At such a hearing the fact, that the petitioning corporation paid taxes upon the same valuation of its real estate after the construction of the bridge that

Evidence (continued).

was alleged to have injured its property that it paid upon before the bridge was constructed, is not an admission by the petitioner that there had been no change in value, such valuation being that of the assessors and not of the petitioner. *Brackett v. Commonwealth*, 119.

Nor is the failure of the petitioner to claim an abatement such an admission. *Ibid.*

Best and Secondary.

Testimony as to an inventory of glass jars which the witness had not counted and which he made from records in a stock book that he kept by making entries from slips that were turned into the office by the glass blowers who made the jars, was held not admissible independently of St. 1913, c. 288, nor under that statute. *Kaplan v. Gross*, 152.

Competency.

A record of a conviction following a plea of *nolo contendere* cannot be used in another proceeding to affect the credibility as a witness of the person so convicted. *Olszewski v. Goldberg*, 27.

It is a settled rule that, in an action to enforce liability for a defendant's negligence in failing to keep appliances in proper repair and condition, evidence of subsequent acts in taking additional precautions to prevent other accidents is not admissible for the purpose of showing that such precautions were needed at the time of the accident. *Albright v. Sherer*, 39.

At the trial of an action by a bank against a married woman upon a promissory note signed with a firm name containing the name of the defendant's husband, daily balance books of the plaintiff were admissible, not only to show the state of the defendant's account, but also to show that the proceeds of the notes in suit, when they were discounted, were credited to the account of the defendant. *Lowell Trust Co. v. Wolff*, 168.

At the same trial, there being ample other evidence to establish the husband's agency for the defendant, evidence of certain statements of the husband as to the defendant's relation to the business and to the old firm name were held to be admissible, they not being testimony by an agent to establish his agency. *Ibid.*

At the same trial, monthly statement envelopes handed monthly by the plaintiff to the defendant's husband during the six and one half years that the account remained with the plaintiff and containing cancelled checks paid from the account and signed in the old firm name, were held to be admissible as independent evidence that the defendant carried on business under the old firm name. *Ibid.*

In support of the claim of an alleged dependent widow under the workmen's compensation act living in a foreign country, post office records are admissible in evidence to show that the deceased employee purchased money orders payable to his wife. *Fierro's Case*, 378.

A deposition of a claimant for compensation as a dependent under the workmen's compensation act is competent evidence upon the question of the dependency of the claimant, and the weight to be given to it is to be determined by the arbitration committee and the Industrial Accident Board. *Ibid.*

In an action against a street railway corporation for personal injuries sustained

in consequence of a collision between a car of the defendant and a coach in which the plaintiff was a passenger, which occurred on a square in a city crossed by intersecting streets, evidence of a customary stopping of cars of the defendant at this square even when there were no passengers to get on or off, was held admissible as having a tendency to show that such stopping was because of the danger from the intersecting streets and to protect travellers on the highway. *Godfrey v. Old Colony Street Railway*, 419.

In the same case it was held that evidence in behalf of the plaintiff was admissible to show that the car was late, from which and other circumstances in the case it might be inferred that the motorman in striving to make up lost time was going at an unusual rate of speed. *Ibid.*

It also was held that evidence was admissible to show that the trolley came off before reaching the place of the accident, this tending to explain a cause of the delay. *Ibid.*

In the same case, in connection with other evidence as to the severity of the impact, it was held that a witness for the plaintiff properly was allowed to testify that his father, who was driving the coach, was killed by the collision, it not appearing that the evidence was introduced for the purpose of creating a prejudice against the defendant on a collateral issue. *Ibid.*

Unanswered letters containing self-serving statements concerning a certain contract, written long after the date of the contract, are not admissible in evidence in behalf of the writer. *Federal Coal & Coke Co. v. Coryell*, 430.

Where, at the trial of an action of tort for personal injuries caused by a loose plank forming part of the temporary surface of a highway, the plaintiff has described a defective condition which she observed at the time of the accident and has testified that she observed the plank three weeks after the accident and that the condition was the same then as it was at the time of the accident, another witness, who saw the plank for the first time three weeks after the accident, may describe its condition at that time. *Stewart v. Hugh Nawn Contracting Co.* 525.

Extrinsic affecting Writings.

Oral evidence was held to be admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the cemetery and to show a condition subject to which the right was granted. *Green v. Danahy*, 1.

Declarations of Deceased Persons.

Under R. L. c. 175, § 66, a declaration of opinion by a deceased person cannot be admitted in evidence, even when such person, if living, would be allowed to testify to the opinion inquired about. *Little v. Massachusetts Northeastern Street Railway*, 501.

Under the above rule, the admission in evidence of testimony at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, as to what a deceased physician, who had treated the intestate after the injury previous to his death, had stated was the cause of the intestate's condition was held to have been harmful error which required the sustaining of the exception. *Ibid.*

Evidence (*continued*).

Relevancy and Materiality.

At the trial of an action for personal injuries received from the plaintiff being struck by a roll of canvas when he was on a ship's deck as a licensee, it was held to be proper for the defendant to ask a sailor on board the vessel, "whether or not a parcel of canvas one and a half feet thick" and from twelve to fourteen feet long, as described by the witness, "could have been conveniently carried down the stairways." *Freeman v. United Fruit Co.* 300.

In the same action the plaintiff can put in evidence the orders given by the boatswain, in reply to an inquiry by one of the sailors whether the canvas was to be carried down or dropped down, "Throw it down; take a chance and throw it down." *Ibid.*

In an action against a street railway corporation for personal injuries sustained in consequence of a collision between a car of the defendant and a coach in which the plaintiff was a passenger, which occurred on a square in a city crossed by intersecting streets, evidence of a customary stopping of cars of the defendant at this square even when there were no passengers to get on or off, was held admissible as having a tendency to show such stopping was because of the danger from the intersecting streets and to protect travellers on the highway. *Godfrey v. Old Colony Street Railway*, 419.

In the same case it was held that evidence in behalf of the plaintiff was admissible to show that the car was late, from which and other circumstances in the case it might be inferred that the motorman in striving to make up lost time was going at an unusual rate of speed. *Ibid.*

It also was held that evidence was admissible to show that the trolley came off before reaching the place of the accident, this tending to explain a cause of the delay. *Ibid.*

In the same case an exception to a refusal by the presiding judge to allow the defendant to ask the plaintiff, who was in the employ of a manufacturer, whether after the accident he received a pension from his employer, where the defendant made no offer of proof was overruled because sufficient facts did not appear on the record to show that the evidence was admissible. *Ibid.*

In the same case in connection with other evidence as to the severity of the impact, it was held that a witness for the plaintiff properly was allowed to testify that his father, who was driving the coach, was killed by the collision, it not appearing that the evidence was introduced for the purpose of creating a prejudice against the defendant on a collateral issue. *Ibid.*

In the same case it was held that it could not be said that the judge improperly exercised his discretion in excluding a question asked by the defendant of its motorman on redirect examination for the purpose of showing that the witness in testifying at an inquest was under a severe mental strain and that contradictions in his testimony were to be attributed to that fact. *Ibid.*

Where a party to an action has excepted to the admission of certain evidence, otherwise competent, on the ground that it tends to create a prejudice against him on a collateral issue, the burden is upon him to disclose in his bill of exceptions sufficient evidence to show that the evidence objected to by him was introduced in such a way or at such a time as to demonstrate its purpose to arouse prejudice. *Ibid.*

Evidence that a superintendent of streets of a town worked under the direction of the selectmen was held not to be relevant or material in an action

against a town which had not authorized the election of road commissioners or a surveyor of highways for damages caused by alleged negligence of such superintendent in permitting a drainage watercourse to become clogged. *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

Remoteness.

Amount of profits of the business of a petitioner for damages caused to his leasehold interest in land by the construction of a drawless bridge across the Charles River, was held to be too remote from the issue as to the extent of damage to the leasehold interest to make evidence on the subject admissible. *Brckett v. Commonwealth*, 119.

Opinion: Experts.

It is a proper exercise of discretion by a judge presiding at the trial of an action for personal injuries due to the falling of a temporary pile of lumber alleged to have been caused by its improper construction, to exclude expert testimony upon the question of the proper piling of the lumber, the subject requiring no peculiar learning or experience and being one upon which the jury can have no difficulty in forming an opinion for themselves as to the likelihood of the pile to fall and injure a person near it. *Lynch v. C. J. Larivee Lumber Co.* 335.

Whether, at the trial of actions for personal injuries resulting from a collision of automobiles, testimony of a witness, that he was in a position to hear the horn of either of the automobiles, was admissible, it was not necessary to decide. *Kennedy v. Armstrong*, 354.

Under R. L. c. 175, § 66, a declaration of opinion by a deceased person cannot be admitted, even when such person, if living, would be allowed to testify to the opinion inquired about. *Little v. Massachusetts Northeastern Street Railway*, 501.

Under the above rule, the admission in evidence of testimony at the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, as to what a deceased physician, who had treated the intestate after the injury previous to his death, had stated was the cause of the intestate's condition was held to have been harmful error which required the sustaining of the exception. *Ibid.*

Private Conversations between Husband and Wife.

It was held that certain testimony of a wife at a hearing upon a petition by her to vacate a decree of divorce, to the effect that she had private talks with her husband about the pending libel and as to the consequences of those talks, was admissible to show a motive for the petitioner's conduct, which was material, and that it need not be excluded as being an indirect statement of the substance of a private conversation between husband and wife. *Sampson v. Sampson*, 451.

The provision of R. L. c. 175, § 20, does not exclude from legal consideration an inference as to what was said in such a private conversation based on the testimony of a wife that she had a private conversation with her husband in consequence of which she did a certain thing and did not do a certain other thing. *Ibid.*

Evidence (continued).

In the case above described certain inferences drawn by the judge, which led him to the conclusion that the petitioner fraudulently was prevented from contesting the libel for divorce by reason of conversations and conduct of his which occurred while the husband and wife were alone, were held not to constitute a violation of R. L. c. 175, § 20. *Sampson v. Sampson*, 451.

Official Records.

In support of the claim of an alleged dependent widow under the workmen's compensation act living in a foreign country, post office records are admissible in evidence to show that the deceased employee purchased money orders payable to his wife. *Fierro's Case*, 378.

Book Entries.

Testimony as to an inventory of glass jars which the witness had not counted and which he made from records in a stock book that he kept by making entries from slips that were turned into the office by the glass blowers who made the jars was held not admissible under St. 1913, c. 288, because the objectionable entries in the inventory were not entries "in an account kept in a book or by a card system or by any other system of keeping accounts," to which alone that statute relates. *Kaplan v. Gross*, 152.

Corporation Certificates and Returns.

Since the enactment of St. 1903, c. 437, § 48, a return made by a domestic business corporation to the tax commissioner is not admissible in evidence at a hearing upon a petition by the corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner. *Brackett v. Commonwealth*, 119.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner. *Ibid.*

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to the leasehold interest. *Ibid.*

View.

Where the bill of exceptions in an action of tort stated that the jury took a view of a wagon, alleged by the plaintiff to be defective, and that the bill contained "all the material evidence in the case," it was held that an assumption that other defects than one which the jury found was not the cause of the accident were disclosed by the view could not be made by way of conjecture in favor of the excepting party, who had failed to show that he was prejudiced by action of the judge in ordering the verdict. *Albright v. Sherer*, 39.

Of Fact undisputed at Trial.

Upon the hearing of exceptions by the defendant in an action against a corporation operating a street railway for personal injuries alleged to have been caused by running down the plaintiff with a car of the defendant, the defendant's counsel in his brief suggested for the first time that there was no evidence that the defendant was operating the street railway on which the plaintiff was injured, but because upon plans put in evidence by the defendant the railway track was designated as the track of the defendant, it was held that, in the absence of any evidence to the contrary, this warranted a finding that the car which struck the plaintiff was operated by the defendant. *Brereton v. Milford & Uzbridge Street Railway*, 130.

Plans.

It is within the discretionary power of a presiding judge to refuse to admit in evidence a plan which he finds to be imperfect. *Hobart v. Weston*, 161.

Photographs.

It is improper for a judge presiding at a trial of an action for personal injuries caused by the fall of a pile of lumber to admit in evidence unverified photographs of piles of lumber, if they are not received as chalks and it is not contended that they represent actual conditions as they existed at the time of the accident. *Lynch v. C. J. Larivee Lumber Co.* 335.

Allegations in Pleadings.

In analogy to R. L. c. 173, § 85, which provides that in actions at law "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them," an allegation or denial in a bill in equity made by the plaintiff in his own favor and sworn to by him; although it is an admission of the truth of the fact stated, cannot be used by him as evidence. *Taylor v. Weingartner*, 243.

Depositions.

Under the circumstances the judge presiding at a trial was held rightly to have refused to permit the plaintiff to introduce in evidence a deposition taken at the defendant's request. *Lynch v. C. J. Larivee Lumber Co.* 335.

A deposition of a claimant for compensation as a dependent under the workmen's compensation act is competent evidence upon the question of the dependency of the claimant, and the weight to be given to it is to be determined by the arbitration committee and the Industrial Accident Board. *Fierro's Case*, 378.

Interrogatories.

See that subtitle under PRACTICE, CIVIL.

Of Domicil.

Evidence warranting finding as to domicil. *Sampson v. Sampson*, 451.

Of Foreign Law.

Where, at a trial before a jury, the law of another State is an issue and a part of the evidence introduced upon the subject consists of a report of a decision of the highest law court of such State, it is improper for the presiding judge to instruct the jury as to what is the rule of law established by that decision. The meaning of the decision is a question of fact to be determined by the jury. *Paddleford v. Lane & Co. Inc.* 113.

Of Ability to Hear.

Whether, at the trial of actions for personal injuries resulting from a collision of automobiles, testimony of a witness, that he was in a position to hear the horn of either of the automobiles, was admissible, it was not necessary to decide. *Kennedy v. Armstrong*, 354.

Of Identity.

Evidence at the trial of an action against a contractor constructing a subway for personal injuries caused by the unguarded presence of a timber or plank on a sidewalk of a public street where such construction was going on, upon which it was held that the jury were warranted in finding that the plank was placed where it was by the servants of the defendant acting within the scope of their authority. *Murphy v. Hugh Nawn Contracting Co.* 404.

Of Intent.

At the trial of complaints under R. L. c. 76, § 8, for practicing medicine without lawfully being authorized and registered on the two days named in the respective complaints, where the defendant contends that on the days named he merely was selling medicines as the agent of certain corporations, the Commonwealth, for the purpose of showing the defendant's intent by his behavior in the course of his business, may introduce evidence of sales of medicines by him on days other than the days named in the complaints when his conduct tended to show that he was prescribing the medicines that he sold. *Commonwealth v. Lindsey*, 392.

Of Speed.

The fact that a street railway car, in passing a boy who was standing on a bank of earth, created a current of air is not evidence of an undue rate of speed. *Selibedea v. Worcester Consolidated Street Railway*, 76.

Evidence that a street railway car was going "fast" without any other indication of its rate of speed and without regard to the conditions existing at the time is too uncertain and indefinite to warrant a finding of negligence or improper operation. *Ibid.*

Violation of Ordinance as Evidence of Negligence.

Whether the conduct of a child rolling a hoop upon a highway was a violation of an ordinance of the city was held to be a question for the jury, in an action for personal injuries received when an automobile ran into him, so that it

could not be ruled as a matter of law that the only duty owed to the plaintiff by the defendant was to refrain from wanton or reckless misconduct. *Patrick v. Deziel*, 505.

Of Value.

Since the enactment of St. 1903, c. 437, § 48, a return made by a domestic business corporation to the tax commissioner not admissible in evidence at a hearing upon a petition by the corporation for the assessment of damages under a statute for injury to its real estate to show that the real estate before the alleged injury was worth less than alleged by the petitioner. *Brackett v. Commonwealth*, 119.

At such a hearing certificates of financial condition filed by the petitioning corporation under St. 1903, c. 437, § 45, cl. 6, which properly have been received in evidence as admissions by the petitioner that its real estate was worth less than was shown by the evidence of the petitioner at the hearing, are not conclusively binding upon the petitioner. *Ibid.*

Still less are such certificates binding upon an individual petitioner, who has filed a separate petition as lessee of the real estate of the corporation for injury to the leasehold interest. *Ibid.*

At such a hearing it is proper to exclude statements made to an assessor as to the value of the petitioner's real estate by one who was a director, the clerk and the auditor of the petitioning corporation and by another who was its vice president and general manager, where it does not appear that these officers were authorized by the corporation to speak for it on that subject or that such statements were within the scope of their official duty. *Ibid.*

At such a hearing the fact, that the petitioning corporation paid taxes upon the same valuation of its real estate after the construction of the bridge that was alleged to have injured its property that it paid before the bridge was constructed, is not an admission by the petitioner that there had been no change in value, such valuation being that of the assessors and not of the petitioner. *Ibid.*

Nor is the failure of the petitioner to claim an abatement such an admission. *Ibid.*

Testimony from Refreshed Recollection.

A witness cannot be allowed to refresh his recollection by a paper containing statements in regard to matters of which he never had any personal knowledge, because he can have no recollection to refresh. *Kaplan v. Gross*, 152.

Self-serving Statements.

In analogy to R. L. c. 173, § 85, which provides that in actions at law "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them," an allegation or denial in a bill in equity made by the plaintiff in his own favor and sworn to by him, although it is an admission of the truth of the fact stated, cannot be used by him as evidence. *Taylor v. Weingartner*, 243.

Unanswered letters containing self-serving statements concerning a certain contract, written long after the date of the contract, are not admissible in evidence in behalf of the writer. *Federal Coal & Coke Co. v. Coryell*, 430.

Evidence (continued).

Absence of Witness.

Where, at a fourth trial of an action a witness who formerly had been an employee of the defendant was not called to testify and there was no evidence that he was in the control either of the plaintiff or of the defendant, it was held that the judge erred in leaving to the jury the question, whether any inference should be drawn against the defendant from the absence of the witness, and that he should have ruled that no inference could be drawn against either the plaintiff or the defendant from the failure to produce the witness. *Fitzpatrick v. Boston Elevated Railway*, 475.

Criminal Record.

A record of a conviction following a plea of *nolo contendere* cannot be used in another proceeding to affect the credibility as a witness of the person so convicted. *Olszewski v. Goldberg*, 27.

To show Bias of Witness.

A witness in an action of tort for loss of an automobile, who had testified for the plaintiff as to its value, should be allowed to be asked questions on cross-examination tending to show that he was working for an insurance company for whose benefit the action was brought or for agents representing that insurance company. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

Admissible in one only of two Cases tried together.

Where, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases without objection by the plaintiff offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites the facts tending to show negligence of the other defendant, and the presiding judge instructs the jury that the statement was not evidence against the other defendant and must be disregarded as to him, an exception by the other defendant must be overruled. *Kennedy v. Armstrong*, 354.

EXCEPTIONS.

To master's report in suit in equity, see appropriate subtitle under EQUITY PLEADING AND PRACTICE.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

EXECUTOR AND ADMINISTRATOR.

Liability on Bond.

In an action by a creditor on the bond of an administrator, it was held on the allegations of the declaration that it was right for the trial judge to refuse a request of the defendant, opposed by the plaintiff, to order the removal of

the case to the jury waived list, the issues being questions of fact for a jury. *McIntire v. Conlan*, 389.

Where at such a trial the principal defendant admits that the plaintiff brought an action against him as administrator and recovered judgment for the debt and that the defendant failed to expose goods or estate to be taken in satisfaction thereof, and where it is not disputed that the amount of the judgment debt is larger than the penal sum of the bond with interest from the date of the writ, the trial judge in his discretion properly may order a verdict for the plaintiff in the penal sum of the bond with interest thereon from the date of the writ. *Ibid.*

It is no defence to such an action for the administrator to prove that he filed in the Probate Court an account purporting to show that the assets which had come to his hands had been exhausted in the payment of charges and preferred claims, if it does not appear that such account ever was allowed by the Probate Court. *Ibid.*

Nor is it a defence to such an action for the administrator to show that, about a month after the entry of the plaintiff's judgment and the issuing of execution thereon, the administrator filed a petition in the Probate Court representing the estate to be probably insolvent, if no further proceedings upon such petition are shown. *Ibid.*

In the above action, the plaintiff in interest contended that the former administrator whose bond was in suit committed a breach of the bond in failing to institute proceedings to recover certain property conveyed by the intestate in fraud of his creditors to the former administrator and one of the sureties on the bond and it was held that under the circumstances no contention of the defendants could prevail which was founded on the assumption that the former administrator was ignorant of the intestate's conveyance in fraud of creditors. *Ibid.*

Limitation of Actions.

Under the circumstances which appeared in a suit in equity under R. L. c. 141, § 10, against an administrator to establish a debt alleged to be due to the plaintiff which was barred under § 9 of that chapter because no suit for its collection had been commenced within two years from the time when the administrator gave his bond, it was held that a finding was warranted that the plaintiff had been guilty of "culpable neglect," which under the provisions of the statute was a bar to the suit. *Estabrook v. Moulton*, 359.

Transfer of Property.

Evidence as to the conduct of a widow who, as the administratrix of the estate of her husband, came into possession, as a part of the assets of his estate, of a certain mortgage and the note secured thereby, which was payable to a former holder of the mortgage and by him had been indorsed in blank including the making of a provision in her will for a specific legacy of the mortgage note to the owner of the real estate and instructing the executor of the will to discharge the mortgage, was held not to warrant a finding that she owned the note and mortgage at the time of her death. *O'Neil v. Cogswell*, 364.

Nothing passed by the specific legacy. *Ibid.*

Interest on Legacy.

One, who was given a legacy by a will and whose entire legacy was not paid for more than a year after the testator's death although the value of the estate warranted a payment within the year, is entitled to be paid interest at six per cent on any unpaid balances from the exoiration of one year from the testator's death. *Gilbert v. Bachelder*, 329.

Right of Action for Death.

Although St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence and requiring that such action shall be brought in the name of the executor or administrator of the person deceased but for the benefit of the wife, husband, parent and child of such person, vests no right of property in the deceased which survives to his personal representative, such an action under that foreign statute may be brought in this Commonwealth against a corporation having a usual place of business here by an administrator appointed here of the estate of a person whose death was caused in English waters by the negligence of the defendant. *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Ibid.*

FIRE.

Insurance against loss by fire, see appropriate subtitle under INSURANCE.

FOOD.

Under the sales act, St. 1908, c. 237, § 15, as before at common law, if one buying meat at a shop relies on the skill and judgment of the dealer in selecting the meat and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, the dealer is liable to the buyer for damages resulting from his supplying unwholesome food. *Gearing v. Berkson*, 257.

If a dealer in meat undertakes to make a selection of pork chops to fill an order given to him by a woman on behalf of her husband, and selects unwholesome meat, the eating of which makes the woman sick, such selection is not, without more, negligence as a matter of law which would make the dealer liable in an action of tort brought against him by the woman for personal injuries so received and alleged to have been caused by his negligence. *Ibid.*

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort

founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Gearing v. Berkson*, 257.

Under such circumstances, neither spouse has a right to recover for the loss of consortium. *Ibid*.

FRATERNAL BENEFICIARY CORPORATION.

Under a certificate issued by a fraternal beneficiary corporation a death benefit was held to be due to the "legal heirs" of the member, although the member had promised orally to his stepdaughter that the benefit should be paid to her if she would pay the premiums and assessments on the certificate, and she had done so for fifteen years and up to the time of his death. *O'Brien v. Ancient Order of United Workmen*, 237.

In an action of contract against a fraternal beneficiary corporation for a death benefit, where the defendant admitted its liability and paid the money into court, and at its request a person who had paid the premiums and assessments on the member's certificate for many years and claimed to be entitled to the death benefit was allowed to interplead, it was held that, while the plaintiffs as matter of law were entitled to recover the benefit, the claimant's claim for reimbursement for money paid for premiums and assessments should be passed upon. *Ibid*.

Accordingly it was held that the claimant was entitled to be reimbursed for the amount of her payments of premiums with interest thereon. *Ibid*.

FRAUD.

The decision of this court at a previous stage of this case reported in 222 Mass. 156, to the effect that certain acts of a creditor of a bankrupt were a fraud upon the law, so that the trustee in bankruptcy in a suit in equity against such creditor could recover the value of certain accounts assigned to the creditor without returning the money received for such accounts by the bankrupt, was affirmed. *Rubenstein v. Lottow*, 227.

The fact that a conveyance was fraudulent as to creditors is no ground for avoiding it between the parties. *Pollock v. Pollock*, 382.

In an action on an administrator's bond, the plaintiff in interest contended that the former administrator whose bond was in suit committed a breach of the bond in failing to institute proceedings to recover certain property conveyed by the intestate in fraud of his creditors to the former administrator and one of the sureties on the bond and it was held that under the circumstances no contention of the defendant could prevail which was founded on the assumption that the former administrator was ignorant of the intestate's conveyance in fraud of creditors. *McIntire v. Conlan*, 389.

A representation, made by the seller of coal and relied on by the buyer, was held to have been promissory in its nature and to have stated a reasonable expectation of the seller, and accordingly its falsity did not entitle the buyer to avoid the contract on the ground of fraud. *Federal Coal & Coke Co. v. Coryell*, 430.

Petition to vacate a decree of divorce on the ground that it was procured by the husband through fraud upon his wife and upon the court. *Sampson v. Sampson*, 451.

Fraud (*continued*).

In such a petition, an allegation that the petitioner fraudulently was induced to believe that the "libel proceedings had been discontinued and dropped" was held to be a sufficiently specific averment of a fraudulent representation. *Sampson v. Sampson*, 451.

On the evidence at the hearing of the above petition it was held that the court, by reason of the gross fraud by which it was attempted to make the court an instrument of oppression and to deprive the libellee of the opportunity to present her just defence to the libel, acquired no jurisdiction of the case, and it was ordered that the decrees *nisi* and absolute be vacated and that the libel be dismissed. *Ibid.*

In an action by the assignee for the benefit of creditors of an insolvent corporation, which had been a dealer in automobiles and motor vehicles as the sales agent of another corporation, to recover the amount of a subscription signed by the defendant to take and pay for at par a certain number of shares of the capital stock of a corporation, a finding was held to have been warranted that the treasurer of the corporation had made no such misrepresentations as would give the defendant a right to rescind the contract. *Everett v. Poster*, 553.

FRAUDS, STATUTE OF.

The mere setting apart by their seller of a carload of oats of the value of more than \$500, the seller intending to deliver the oats to a certain buyer under an oral contract of sale of which there is no memorandum in writing, there being no acceptance by the buyer, does not satisfy the requirements of the statute of frauds contained in St. 1908, c. 237, § 4. *Peck v. Abbott & Fernald Co.* 423.

In a suit in equity to enforce an equitable restriction alleged to have been imposed on the defendant's land, where it appeared that no owner of the land ever had created by deed any restriction upon it, it was said that it was unnecessary to consider whether the statute of frauds would be a bar to the relief sought by the plaintiff. *Sargent v. Leonardi*, 556.

FRAUDULENT CONVEYANCE.

See appropriate subtitle under EQUITY JURISDICTION.

FRAUDULENT PREFERENCE.

See appropriate subtitle under BANKRUPTCY.

GARAGE.

Where one, in whose name the owner of an automobile had permitted the automobile to be registered, without the owner's knowledge or consent left the automobile in a public garage, and thereafter, learning these facts, the owner wrote to the proprietor of the garage a certain letter, it was held that thereafter, under St. 1913, c. 300, § 1, the proprietor of the garage had a lien on the automobile for proper charges for storage and care. *Doody v. Collins*, 332.

And therefore the owner was held not entitled to take the automobile from the garage by virtue of a writ of replevin which he sued out without paying

or tendering to the proprietor of the garage his proper charges, if the proprietor did nothing to estop him from contending either that he had a lien or that the owner had made no sufficient tender. *Doddy v. Collins*, 332.

And the mere fact, that the proprietor of the garage "at the time of replevin" claimed and demanded payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, was held not to estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender. *Ibid*.

GENERAL COURT.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is contrary to c. 1, § 3, art. 10, of the Constitution, which provides that "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members," and also to art. 30 of the Declaration of Rights, which declares the separation of the legislative and judicial departments of the government. *Dinan v. Swig*, 516.

GOOD WILL.

It seems, that the practice of dentistry, which depends for its success on personal qualities and professional skill, has no good will that arises merely from the place where it is carried on. *Wightman v. Wightman*, 398.

GRADE CROSSING.

Action by a milkman for injuries caused by a stake left protruding in a sidewalk during the abolition of a grade crossing of a railroad with a private way. *Coles v. Boston & Maine Railroad*, 408.

HARBOR MASTER OF THE HARBOR OF BOSTON.

A regulation made by the harbor master of the harbor of Boston, that sailing vessels shall anchor in a part of a designated area off Bird Island flats that is not "reserved for steamers, exclusively," means that a vessel must anchor so that at all times it will lie wholly within the area designated for vessels of that class, and so construed the regulation is a reasonable one and therefore valid. *Commonwealth v. Perkins*, 84.

HIGHWAY.

See *WAY, Public*.

HOUSE OF REPRESENTATIVES.

So much of St. 1914, c. 783, § 10, as undertakes to impose upon the courts the duty of inquiry into corrupt practices in connection with the election of members of the General Court is contrary to c. 1, § 3, art. 10, of the Constitution,

House of Representatives (*continued*).

which provides that "The House of Representatives shall be the judge of the returns, elections, and qualifications of its own members." *Dinan v. Swig*, 516.

HUSBAND AND WIFE.

It is no defence to a complaint under St. 1911, c. 456, § 1, for refusing to provide for the support and maintenance of the complainant as the defendant's wife, that the defendant was induced to marry the complainant by her false representations that she was chaste. *Commonwealth v. Shaman*, 62.

A decree dismissing a libel by a husband under R. L. c. 151, § 11, for annulling his marriage establishes the status of husband and wife and cannot be attacked collaterally by the husband in his attempted defence to a complaint against him under St. 1911, c. 456, § 1, for refusing to provide for the support of his wife. *Ibid*.

On the evidence at the hearing by a judge without a jury of an action by a bank against a married woman upon a promissory note signed with a firm name containing the name of the defendant's husband, it was held that a finding was warranted that the defendant had authorized her husband to carry on the business, formerly his, for her, and that the note in suit was signed by him by her authority with a firm name under which she was doing business. *Lowell Trust Co. v. Wolff*, 168.

The mere fact that a married woman signed and recorded a certificate under R. L. c. 153, § 10, that she proposed to do business on her separate account at a certain number on Howard Street in a city under her name, "E. Wolff," does not make illegal a business thereafter conducted by her without the recording of a new certificate at Apple Street in the same city under the name, "A. Wolff & Co.," which was a business name formerly used by her husband, although her failure to record a new certificate might make her husband liable upon contracts lawfully entered into by her in the prosecution of such business. *Ibid*.

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Gearing v. Berkson*, 257.

Under such circumstances, neither spouse has a right to recover for the loss of consortium. *Ibid*.

Where a husband caused the title to real estate to be taken in the name of his wife because "he wished to prevent these premises from being taken for his obligation" to existing creditors, this affords him no ground for establishing a resulting trust in the property conveyed. *Pollock v. Pollock*, 382.

In order that a husband may establish a resulting trust in real estate purchased in the name of his wife, he must prove that he furnished either the entire consideration or a specific and definite part of it for which he should receive a determinate fraction of the property conveyed, and he further must show that it was not intended at the time of the conveyance that the wife should take a beneficial interest in the property by way of gift. *Ibid*.

Application of the foregoing rule, showing that no resulting trust existed under certain circumstances. *Pollock v. Pollock*, 382.

It was held that certain testimony of a wife at a hearing upon a petition by her to vacate a decree of divorce, to the effect that she had private talks with her husband about the pending libel and as to the consequences of those talks, was admissible to show a motive for the petitioner's conduct, which was material, and that it need not be excluded as being an indirect statement of the substance of a private conversation between husband and wife. *Sampson v. Sampson*, 451.

The provision of R. L. c. 175, § 20, does not exclude from legal consideration an inference as to what was said in such a private conversation based on the testimony of a wife that she had a private conversation with her husband in consequence of which she did a certain thing and did not do a certain other thing. *Ibid.*

In the case above described certain inferences drawn by the judge, which led him to the conclusion that the petitioner fraudulently was prevented from contesting the libel for divorce by reason of conversations and conduct of his which occurred while the husband and wife were alone, were held not to constitute a violation of R. L. c. 175, § 20. *Ibid.*

If, in a case where the domicile or legal residence of a man is material, it appears that his domicile by birth was in a certain county in this Commonwealth, that he married there and lived there with his wife, and that later when he had been absent he made frequent visits to his wife who continued to live in the house that they had lived in together, a finding is justified that he retained his domicile in that place. *Ibid.*

Dependency of a wife upon an employee under workmen's compensation act, see appropriate subtitle under WORKMEN'S COMPENSATION ACT.

ICE.

See SNOW AND ICE.

IGNORANCE OF THE LAW.

An employee's ignorance of his rights and obligations under the workmen's compensation act does not excuse him from compliance with its requirements. *Pecott's Case*, 546.

ILLEGITIMACY.

Upon a complaint under such statute which incorporates by reference the provision as to practice contained in St. 1911, c. 456, § 7, that "proof . . . of the neglect or refusal . . . shall be *prima facie* evidence that such . . . neglect or refusal is wilful and without just cause," the jury can find the defendant guilty although no demand was made upon him during the three years preceding the time of the trial. *Commonwealth v. Callaghan*, 150.

Such statutory provision is not an *ex post facto* law and is constitutional. *Ibid.*

It is not a defence to a complaint under St. 1913, c. 563, § 7, against the father of an illegitimate child for neglecting and refusing to contribute reasonably to the support of such child, that after the birth of the child the mother married another man who provides for the child's support. *Ibid.*

Illegitimacy (*continued*).

The fact that, after procuring a decree absolute of divorce, a man married again and the second wife became thereby the mother of a child was held not to bar a vacation of the decree of divorce where it appeared that it had been procured by fraud practiced by the husband upon the former wife and upon the court. *Sampson v. Sampson*, 451.

The second wife's only protection was held to be that afforded by St. 1902, c. 310, under which her innocence and the legitimacy of her child may be established. *Ibid*.

INCOME AND CAPITAL.

See CAPITAL AND INCOME.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INQUEST.

At the trial of an action against a street railway company for personal injuries suffered by the plaintiff in a collision where another person was killed, it was held that it could not be said that the judge improperly exercised his discretion in excluding a question asked by the defendant of its motorman on re-direct examination for the purpose of showing that the witness in testifying at an inquest was under a severe mental strain and that contradictions in his testimony were to be attributed to that fact. *Godfrey v. Old Colony Street Railway*, 419.

INSANE PERSON.

Instance of the termination by the insanity of a dentist of the relation of master and servant between him and his brother who was carrying on his business for him. *Wightman v. Wightman*, 398.

In a suit in equity for an accounting, brought by a dentist against his brother, who had carried on the plaintiff's business for him while the plaintiff was insane, it was held that, as the defendant, although not bound to do so, had carried on the business on the plaintiff's account for a certain length of time, he must account to the plaintiff for his profits during this period. *Ibid*.

In the same suit it also was held that the defendant was not bound to continue this relation indefinitely and had a right to carry on the practice of dentistry on his own account, paying the plaintiff for any of the plaintiff's machinery, tools and furniture of which he made use, and accordingly that the period for which the defendant was bound to account to the plaintiff for his profits ended when the defendant ceased to carry on the work of the office for the benefit and on account of the plaintiff. *Ibid*.

INSOLVENCY.

Determination of insolvency of one of two partners required consideration of partnership liabilities. *Rubenstein v. Lottow*, 227.

INSURANCE.

Life.

Fraternal beneficiary insurance, see FRATERNAL BENEFICIARY CORPORATION.

Fire.

Demurrer to a declaration in an action of contract by a mortgagee of personal property against an insurance company upon a policy of fire insurance payable in case of loss to another person and the plaintiff as their interest might appear, was sustained because there was no allegation to indicate what interest, if any, the other payee had in the proceeds due under the policy and no allegation of the total value of the goods covered by the policy that had been destroyed or damaged. *Frisbee v. Prussian National Ins. Co.* 159.

The interest under an insurance policy of one insured by a contract of fire insurance on a building in the Massachusetts standard form, after the destruction of the building by fire before the insurance company has elected whether it will pay the loss or will rebuild the building, is property which can be reached and applied in a suit in equity under R. L. c. 159, § 3, cl. 7, in satisfaction of a debt of the insured. *Lewenstein v. Forman*, 325.

Liability.

An insurance company, which had paid to the plaintiff in an action of tort the amount of the loss sustained by reason of the negligence of the defendant, was held to have been subrogated to the rights of the plaintiff against the defendant and to be entitled to maintain the action in the plaintiff's name. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

Refusal by a judge, who presided at the trial together of two actions of tort by the same plaintiff against different defendants for personal injuries resulting from a collision of automobiles, to stop the trial and to take one of the cases from the jury merely because of a suggestion by the plaintiff's counsel in cross-examination of a medical expert called by the defendant in that case, that the defendant was insured and that the defendant in interest was an insurance company, was held under the circumstances not to be an abuse of judicial discretion. *Kennedy v. Armstrong*, 354.

Fidelity.

Requirement of the signature of the employee to a bond of a surety company insuring his fidelity was held not to have been waived by the insurer by a certain letter to the insured, not signed by any of the officers authorized to make such a waiver for the corporation and not shown to have come to their knowledge, although the insured relies on the letter and makes no attempt to obtain the signature of the employee. *Wilcock v. Massachusetts Bonding & Ins. Co.* 482.

INTENT.

Evidence of, see appropriate subtitle under EVIDENCE.

INTEREST.

Where a lessee under a ten year lease deposited with a third person as trustee the sum of \$3,000 as security for the payment of the rent under the lease, it was held, in a suit in equity by the lessee against the trustee for an accounting, that the defendant, who had held the fund deposited with him upon an express trust and had invested it, was bound to account to the plaintiff for the interest earned. *Thompson v. Knapp*, 277.

One, who was given a legacy by a will and whose entire legacy was not paid for more than a year after the testator's death although the value of the estate warranted a payment within the year, is entitled to be paid interest at six per cent on any unpaid balances from the expiration of one year from the testator's death. *Gilbert v. Bachelder*, 329.

INTERPLEADER.

The provisions of R. L. c. 173, authorizing an interpleader in an action at law, do not alter the settled doctrines applicable to bills of interpleader in equity. *Gonia v. O'Brien*, 177.

Such statute does not give a defendant a right as a matter of law to have a petition granted to have one whom he alleged was the plaintiff's principal compelled to interplead, where such petition is not filed until after a verdict has been rendered for the plaintiff upon issues including those raised by the petition. *Ibid.*

Nor does the statute give to a claimant a right as a matter of law to intervene in such an action after a verdict for the plaintiff. *Ibid.*

In an action of contract against a fraternal beneficiary corporation for a death benefit, where the defendant admitted its liability and paid the money into court, and at its request a person who had paid the premiums and assessments on the member's certificate for many years and claimed to be entitled to the death benefit was allowed to interplead, it was held that, while the plaintiffs as matter of law were entitled to recover the benefit, the claimant's claim for reimbursement for money paid for premiums and assessments should be passed upon. *O'Brien v. Ancient Order of United Workmen*, 237.

Accordingly it was held that the claimant was entitled to be reimbursed for the amount of her payments of premiums with interest thereon. *Ibid.*

INTERROGATORIES.

See that subtitle under PRACTICE, CIVIL.

INTOXICATING LIQUORS.

A member of a licensing board appointed under R. L. c. 100, § 4, is not required to take an oath of office in order to qualify. *Brogan v. Mayor of Lawrence*, 196.

It was held proper to grant a writ of mandamus to compel recognition of a member of the licensing board of the city of Lawrence, appointed by a pencil writing signed by the mayor in which the name of the appointee was inserted by direction of the mayor after the writing had been signed by him

and the appointee then was notified of his appointment, although the mayor died thereafter and the writing making the appointment, in accordance with the mayor's previous direction, was handed to the appointee the day after the mayor's death. *Brogan v. Mayor of Lawrence*, 196.

INVITED PERSON.

A milkman who leaves his wagon and goes on foot to deliver milk at the house of a customer that abuts on a sidewalk of a private street which is open to the use of abutters, although the adjoining roadway is closed to travel, is using the sidewalk by invitation, not only when he is delivering the milk, but also after he has left it and when he is walking along the sidewalk on his way back to his wagon. *Coles v. Boston & Maine Railroad*, 408.

JOINT DEBTORS.

A judgment on one entire debt against two joint defendants is discharged as to both defendants by a release under seal discharging one of them. *Brooks v. Neal*, 467.

A receiver has authority with the approval of the court that appointed him to compromise a judgment debt of two joint debtors, where he has been unable to find any property of either of them, by releasing the debtors on receiving a sum of money less than the amount of the judgment from one of them. *Ibid.*

JOINT TORTFEASORS.

Where, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases without objection by the plaintiff offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites facts tending to show negligence of the other defendant, and the presiding judge instructs the jury that the statement was not evidence against the other defendant and must be disregarded as to him, an exception by the other defendant must be overruled. *Kennedy v. Armstrong*, 354.

JUDGMENT.

Not subject to Attack Collaterally.

A decree dismissing a libel by a husband under R. L. c. 151, § 11, for annulling his marriage establishes the status of husband and wife and cannot be attacked collaterally by the husband in his attempted defence to a complaint against him under St. 1911, c. 456, § 1, for refusing to provide for the support of his wife. *Commonwealth v. Shaman*, 62.

Special.

In an action of contract, in which the defendant filed a petition in bankruptcy while the action was pending and obtained a discharge, and where no bond

Judgment (continued).

had been given to dissolve the attachment and no money had been paid into court, it was held that the discharge in bankruptcy barred the action and that no special judgment could be entered under R. L. c. 177, §§ 24, 25. *Fingold v. Schacter*, 274.

In an action at law a deposit of money by the defendant's attorney with the plaintiff's attorney acknowledged to have been received "in lieu of attachment bond" cannot be made the foundation of a special judgment under R. L. c. 177, §§ 24, 25, being a form of security not recognized by that statute. *Ibid.*

Vacation of Judgment or Decree.

The granting of a petition for the vacation of a judgment rests largely in the discretion of the judge. *Hunt v. Simester*, 489.

Evidence upon which it was held that it could not be said that a judge in vacating a judgment had exercised his discretion improperly. *Ibid.*

Where, on a petition, filed under R. L. c. 193, §§ 15-17, to vacate a judgment in the sum of over \$15,000, a judge of the Superior Court erroneously issued an order that notice issue and that, upon the filing of a bond for \$5,000, a writ staying execution should issue, it was held that he might correct the error before he ordered that the judgment be vacated and that a writ of supersedeas should issue because the hearing upon the petition was still open. *Ibid.*

On a petition to vacate a decree of the Probate Court which had been made more than twelve years before the filing of the petition and which was based on the fact that the petitioner had died more than seven years before that time and ordered the distribution of a fund that had been deposited in a savings bank for his benefit, it was held that under the circumstances the decree must be vacated and a decree entered establishing the petitioner's right to the fund, but that no liability should be imposed upon the savings bank. *Jones v. Jones*, 540.

JURISDICTION.

A provision, in an ordinary commercial contract in writing between a Massachusetts corporation and a Pennsylvania corporation, that the Massachusetts corporation shall not sue the Pennsylvania corporation except in the courts of Common Pleas in the State of Pennsylvania, is void and cannot be enforced to deprive the courts of this Commonwealth of jurisdiction. *Nashua River Paper Co. v. Hammermill Paper Co.* 8.

Jurisdiction for the purpose of imposing a succession tax exists only when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the State levying the tax. *Welch v. Treasurer & Receiver General*, 87.

Under St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, it is for the courts of this Commonwealth to determine whether property of a resident of this Commonwealth which is not therein at the time of his death is "legally subject" to a legacy tax in another State or country. *Ibid.*

If a resident of this Commonwealth at the time of his death owns shares of capital stock in a railroad corporation incorporated in three other States in which it operates its railroad, each of such three other States has jurisdictional power to impose a succession tax upon the shares. *Ibid.*

Commissioners appointed upon a petition under St. 1911, c. 439, for the assessment of damages caused by the construction of the drawless bridge over the Charles River called "Anderson," or "Stadium Bridge," were held to be officers of the Supreme Judicial Court by whom they were appointed. *Brackett v. Commonwealth*, 119.

That court therefore had the power and was charged with the duty of enforcing the report of such commissioners if it was according to the law and ought to be enforced. *Ibid*.

Therefore the Superior Court had no jurisdiction over the petitions filed in that court, the remedy afforded by St. 1911, c. 439, being sufficient and exclusive. *Ibid*.

Although St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence and requiring that such action shall be brought in the name of the executor or administrator of the person deceased but for the benefit of the wife, husband, parent and child of such person, vests no right of property in the deceased which survives to his personal representative, such an action under that foreign statute may be brought in this Commonwealth against a corporation having a usual place of business here by an administrator appointed here of the estate of a person whose death was caused in English waters by the negligence of the defendant. *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

An executor or administrator appointed in this Commonwealth may bring in the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Ibid*.

Whether the Superior Court ever can have jurisdiction to try and decide a suit for divorce in which the venue of the libel was laid wrongly because neither of the parties lived in the county where the libel was filed as required by R. L. c. 152, § 6, here was mentioned as a question which it was not necessary to decide in the present case. *Sampson v. Sampson*, 451.

Falsity of allegations in a libel for divorce as to the residences of the parties was held to warrant a ruling by the trial judge at the hearing of a petition to vacate the decree of divorce obtained in the suit so brought, in substance that the court had only an apparent and not a real jurisdiction of the libel. *Ibid*.

On the evidence at the hearing of the above petition it was held that the court, by reason of the gross fraud by which it was attempted to make the court an instrument of oppression and to deprive the libellee of the opportunity to present her just defence to the libel, acquired no jurisdiction of the case, and it was ordered that the decrees *nisi* and absolute be vacated and that the libel be dismissed. *Ibid*.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

JURY AND JURORS.

While a juror properly may apply his general knowledge and experience to the subject of inquiry and in determining the weight and credibility of the evidence, he is not permitted to act upon his private knowledge of particular facts which are not matters of common knowledge. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

In an action by a creditor on the bond of an administrator, it was held on the allegations of the declaration that it was right for the trial judge to refuse a request of the defendant, opposed by the plaintiff, to order the removal of the case to the jury waived list, the issues being questions of fact for a jury. *McIntire v. Conlan*, 389.

In an action at law, where the defendant had claimed a jury trial and, when the case came on for trial, waived the claim and moved to have the case taken from the jury list, whereupon the plaintiff moved orally for a trial by jury, and where the presiding judge denied the defendant's motion and ordered that the trial proceed before a jury, it was held that the error of the judge in denying the defendant's motion did the defendant no harm and would not support an exception, because the plaintiff had a right to move orally for a trial by jury and the judge had power to grant that motion as he did. *Gouzoulas v. F. W. Stock & Sons*, 537.

LABOR.

Section 1 of St. 1914, c. 600, which provides that "in all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference," is in no way confined in its application, by the subsequent sections of the statute referring to the civil service, to those cities and towns where the classified civil service prevails under the civil service law. *Lee v. Lynn*, 109.

The provisions contained in St. 1914, c. 600, §§ 2, 3, prohibiting the civil service commission from placing upon its lists any person not a citizen of the United States, and providing for the discharge of aliens temporarily appointed because of a lack of a list of eligible appointees, are constitutional and valid. *Ibid.*

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, relating to the giving of preference in public works to citizens of the Commonwealth, do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. *Ibid.*

Nor are the provisions of the statutes mentioned above in conflict with the Constitution of this Commonwealth. *Ibid.*

Whether the statutes mentioned above require the discharge of faithful and efficient aliens in service at the time of their enactment or whether they relate only to the future, it was not necessary to determine in the present case. *Ibid.*

LACHES.

The provisions of R. L. c. 173 relating to interpleader in actions at law do not give a defendant a right as a matter of law to have a petition granted

to have one whom he alleged was the plaintiff's principal compelled to interplead, where such petition is not filed until after a verdict has been rendered for the plaintiff upon issues including those raised by the petition. *Gonia v. O'Brien*, 177.

It cannot be said as matter of law that a delay of seven or eight months after the entering of an absolute decree for divorce before filing a petition to vacate such decree is in itself necessarily laches. *Sampson v. Sampson*, 451.

Evidence in the above suit was held to warrant a finding that the delay in filing the petition to vacate the decree did not indicate either laches or want of good faith. *Ibid*.

See also that subtitle under EQUITY JURISDICTION.

LAND COURT.

Although in a case in the Land Court, where a trial by jury is not claimed, the findings of a judge of that court upon all questions of fact are final, yet, where the facts on which a finding was made are not in dispute and all the evidence is before this court, the question of law is presented whether the evidence justified the finding of the judge. *Hart v. Rueter*, 207.

A finding by a judge of the Land Court that the "porte-cochère of the house on the respondent's premises extends over, or into, the restricted area," in the absence of a finding that the structure was built and maintained in violation of the restriction, was held not to require a ruling that as matter of law its existence constituted a violation of an equitable restriction imposed upon lots adjoining a private street which required "that no building shall be placed nearer to said principal avenue than twenty-five feet." *Ibid*.

LANDLORD AND TENANT.

Construction of Lease.

Construction of a covenant by a lessee of real estate that, "during said term in every tax year in which the valuation of the land (not including the buildings thereon) . . . as valued by the Assessors for assessment of taxes shall exceed such present valuation thereof, namely, \$98,900, he" would pay a certain additional rent, where it appeared that \$98,900 was the assessment for April 1 of the previous year and the assessment of April 1 of the present year was greater. *Winsor v. Ulin*, 282.

As to a provision in the same lease for apportionment of the additional rent, it was said that it presumably meant that, if such additional rent should be payable for the first year of the lease, the lessee should pay on October 1 only for the four months' period from the beginning of the term instead of for the half year from April 1. *Ibid*.

Petitions for Damages to Estate.

An owner and a lessee of the same real estate abutting on the Charles River should bring separate petitions under St. 1911, c. 439, for the assessment of damages caused by the construction over Charles River of the drawless bridge called "Anderson," or "Stadium Bridge." *Brackett v. Commonwealth*, 119.

Landlord and Tenant (continued).

The only damage which the owner of such leased property can recover is that sustained by the part of the whole property which is left after deducting from it the value of the lessee's interest, and the duty of the commissioners is to find separately the damages suffered by each petitioner. *Brackett v. Commonwealth*, 119.

Deposit by Lessee as Security.

Where a lessee under a ten year lease deposited with a third person as trustee the sum of \$3,000 as security for the payment of the rent under the lease, it was held, in a suit in equity by the lessee against the trustee for an accounting, that the defendant, who had held the fund deposited with him upon an express trust and had invested it, was bound to account to the plaintiff for the interest earned. *Thompson v. Knapp*, 277.

And it was said that, inasmuch as the defendant had invested the fund, it was not necessary to consider whether he would have been liable for a failure to invest it. *Ibid.*

And it was assumed from the record that a claim of the trustee for compensation either was disallowed or had been waived. *Ibid.*

Damages for Breach of Covenant as to Competing Business.

In an action upon a covenant in a lease for the rent of a store, the defendant was held not to be entitled to recoup substantial damages for the breach by the plaintiff, the lessor, of a covenant in the lease by which he agreed not to sell neckties or underwear during the term of the lease, because the only damages which resulted from the breach were to a corporation, which occupied the premises, of which the defendant was the principal stockholder and manager and to which he had transferred all his business, although the relation of the lessee to the corporation was known to the lessor when the lease was made. *Thresher v. Simpson*, 349.

Duties and Liabilities of Landlord to Tenant.

Tenant of an apartment in a tenement house, who was induced to remain a tenant because the landlord agreed to thaw out the pipes, was held to be entitled to maintain an action of tort against the landlord for damages resulting from a fire caused by negligence of the landlord in performing his agreement. *Franco v. Maker*, 71.

On the evidence at the trial of an action by the tenant of a store in a building against his landlord, who was the owner of the building and in control of its roof and pipes, for damage to the plaintiff's goods alleged to have been caused by the negligence of the defendant in permitting a pipe or conductor leading from the roof to become leaky and out of repair, it was held that the plaintiff was entitled to go to the jury. *Hilden v. Naylor*, 290.

The owner of a building containing apartments, who has leased the entire building to another and has retained no control over any part of it, cannot be held liable to a sublessee of an apartment for a want of repair in a dumb-waiter used in connection with that apartment. *Green v. Hammond*, 318.

Where the lessee of an apartment has by the terms of his lease the right to the exclusive enjoyment and control of a dumb-waiter, the lessor is not required to inspect the dumb-waiter or to keep it in repair. *Ibid.*

Where the owner of a house let to a single tenant at will has agreed to make general repairs during the tenancy, and fails to keep his agreement, this does not make him liable in tort to the tenant for personal injuries sustained by the tenant by reason of the giving way of rotten steps that the owner had failed to repair after being told that they were "shaky" when apparently they were in good condition. *Lane v. Raynes*, 514.

LEGACY.

See DEVISE AND LEGACY.

LEGISLATURE.

See GENERAL COURT.

LETTER.

Where one, in whose name the owner of an automobile had permitted the automobile to be registered, without the owner's knowledge or consent left the automobile in a public garage, and thereafter, learning these facts, the owner wrote to the proprietor of the garage a certain letter, it was held that thereafter, under St. 1913, c. 300, § 1, the proprietor of the garage had a lien on the automobile for proper charges for storage and care. *Doody v. Collins*, 332.

Unanswered letters containing self-serving statements concerning a certain contract, written long after the date of the contract, are not admissible in evidence in behalf of the writer. *Federal Coal & Coke Co. v. Coryell*, 430.

LICENSE.

Oral evidence was held to be admissible to show that a certificate representing the right of burial in a certain lot in a cemetery did not contain the whole of the contract between the certificate holder and the proprietor of the cemetery and that the right was granted subject to the condition that the certificate holder should grade and care for the lot and that, if he failed to do so, the right of burial might be revoked and remains interred in the lot might be removed. *Green v. Danahy*, 1.

Bill in equity to enjoin the proprietor of such lot from removing remains therefrom when the condition above described was not fulfilled was dismissed. *Ibid.*

LICENSING BOARD.

A member of a licensing board appointed under R. L. c. 100, § 4, is not required to take an oath of office in order to qualify. *Brogan v. Mayor of Lawrence*, 196.

It was held proper to grant a writ of mandamus to compel recognition of a member of the licensing board of the city of Lawrence appointed by a pencil writing signed by the mayor in which the name of the appointee was inserted by direction of the mayor after the writing had been signed by him and the appointee then was notified of his appointment, although the mayor died

Licensing Board (*continued*).

thereafter and the writing making the appointment, in accordance with the mayor's previous direction, was handed to the appointee the day after the mayor's death. *Brogan v. Mayor of Lawrence*, 196.

LIEN.

Where one, in whose name the owner of an automobile had permitted the automobile to be registered, without the owner's knowledge or consent left the automobile in a public garage, and thereafter, learning these facts, the owner wrote to the proprietor of the garage a certain letter, it was held that thereafter, under St. 1913, c. 300, § 1, the proprietor of the garage had a lien on the automobile for proper charges for storage and care. *Doody v. Collins*, 332.

And therefore the owner was held not entitled to take the automobile from the garage by virtue of a writ of replevin which he sued out without paying or tendering to the proprietor of the garage his proper charges, if the proprietor did nothing to estop him from contending either that he had a lien or that the owner had made no sufficient tender. *Ibid*.

And the mere fact, that the proprietor of the garage "at the time of replevin" claimed and demanded payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, was held not to estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender. *Ibid*.

LIGHT AND AIR.

Construction of a certain deed granting an easement of light and air. *Kessler v. Bowditch*, 265.

LIMITATIONS, STATUTE OF.

Upon construction of a trust created by an interlocutory decree in equity ordering that certain specified property should be transferred to a trustee "in trust, to pay all present just debts, charges and expenses, of said E. R.," it was held that a petition to intervene in the suit filed seven years and a half after the decree was made by an alleged creditor of E. R., was not barred by the statute of limitations because the statute did not begin to run in favor of the trustee unless and until the trust was repudiated by him. *Rice v. Merrill*, 279.

Under the circumstances which appeared in a suit in equity under R. L. c. 141, § 10, against an administrator to establish a debt alleged to be due to the plaintiff which was barred under § 9 of that chapter because no suit for its collection had been commenced within two years from the time when the administrator gave his bond, it was held that a finding was warranted that the plaintiff had been guilty of "culpable neglect," which under the provisions of the statute was a bar to the suit. *Estabrook v. Moulton*, 359.

LIS PENDENS.

Defence in suit in equity of the pendency of an action at law for the same cause. *Spear v. Coggan*, 156.

LOWELL.

An order passed by the municipal council of Lowell to extend a certain street in that city from one street named to another street named is not "the granting, renewal or extending of any general franchise or general right to occupy or use the streets, highways, bridges or public places in the city." *Kelty v. City Clerk of Lowell*, 369.

Therefore under the provision of the amended charter of the city of Lowell contained in St. 1911, c. 645, § 61, a petition for a referendum vote upon such order must be filed in the office of the city clerk during the ten days next following the passage of the order, and not merely during the thirty days next following its passage. *Ibid.*

MANDAMUS.

It was held proper to grant a writ of mandamus to compel recognition of a member of the licensing board of the city of Lawrence appointed by a pencil writing signed by the mayor in which the name of the appointee was inserted by direction of the mayor after the writing had been signed by him and the appointee then was notified of his appointment, although the mayor died thereafter and the writing making the appointment, in accordance with the mayor's previous direction, was handed to the appointee the day after the mayor's death. *Brogan v. Mayor of Lawrence*, 196.

Employee in the civil service employment of Boston improperly discharged was held to be entitled to maintain an action of contract against the city for damages resulting from the breach by the city of the contract of employment and not to be restricted to the remedy provided by St. 1908, c. 210, § 3, there called "a petition in the form of mandamus," to compel the restoration of his name to the pay-roll. *Tucker v. Boston*, 478.

MARRIAGE AND DIVORCE.

Annulment of Marriage.

A decree dismissing a libel by a husband under R. L. c. 151, § 11, for annulling his marriage establishes the status of husband and wife and cannot be attacked collaterally by the husband in his attempted defence to a complaint against him under St. 1911, c. 456, § 1, for refusing to provide for the support of his wife. *Commonwealth v. Shaman*, 62.

Venue of Libel.

In the provision of R. L. c. 152, § 6, that "Libels for divorce shall be filed, heard and determined in the Superior Court held for the county in which one of the parties lives," the word "lives" plainly means "has his or her legal residence or domicil." *Sampson v. Sampson*, 451.

In a finding of a trial judge that the libellant in a suit for divorce "lived there [in Springfield] during a part of the summer and fall of 1912" and a further finding that the domicil of the libellant at that time was in Westport, the word "lived" is used in the sense of "subsisted" and does not relate to legal residence. *Ibid.*

Whether the Superior Court ever can have jurisdiction to try and decide a suit for divorce in which the venue of the libel was laid wrongly because neither of the parties lived in the county where the libel was filed as required by R. L. c. 152, § 6, here was mentioned as a question which it was not necessary to decide in the present case. *Sampson v. Sampson*, 451.

Petition to vacate Decree.

A petition to vacate a decree of divorce that was entered *nisi* and afterwards became absolute, which alleged fraudulent conduct and representations of the husband causing the petitioner not to contest the libel, to which she had a complete defence, was held to set forth sufficient ground for relief, without an allegation that the petitioner did not receive notice of the libel. *Sampson v. Sampson*, 451.

Where in such a petition it is alleged that in the libel for divorce, which was filed in the county of Hampden, it was alleged falsely that the residence of the libellant was in Springfield and that the residence of the libellee was in another State, the petition was held not to have been made defective by the omission of an allegation that the Superior Court of Hampden County had no jurisdiction over the libel for divorce, because other grounds of fraud were stated. *Ibid.*

In such a petition, an allegation that the petitioner fraudulently was induced to believe that the "libel proceedings had been discontinued and dropped" was held to be a sufficiently specific averment of a fraudulent representation. *Ibid.*

If the respondent wishes for further particulars, he can file a motion for specifications. *Ibid.*

Where a woman, who married the petitioner's husband after he had obtained the divorce sought to be annulled, had at her own request been made a respondent to the petition, it was held not to be necessary for the petitioner to add to her petition any averments in regard to the new respondent. *Ibid.*

It cannot be said as matter of law that a delay of seven or eight months after the entering of an absolute decree for divorce before filing a petition to vacate such decree is in itself necessarily laches. *Ibid.*

Evidence in the above suit was held to warrant a finding that the delay in filing the petition to vacate the decree did not indicate either laches or want of good faith. *Ibid.*

It was held that certain testimony of a wife at a hearing upon a petition by her to vacate a decree of divorce, to the effect that she had private talks with her husband about the pending libel and as to the consequences of those talks, was admissible to show a motive for the petitioner's conduct, which was material, and that it need not be excluded as being an indirect statement of the substance of a private conversation between husband and wife. *Ibid.*

In the case above described certain inferences drawn by the judge, which led him to the conclusion that the petitioner fraudulently was prevented from contesting the libel for divorce by reason of conversations and conduct of his which occurred while the husband and wife were alone, were held not to constitute a violation of R. L. c. 175, § 20. *Ibid.*

Falsity of allegations in a libel for divorce as to the residences of the parties was held to warrant a ruling by the trial judge at the hearing of a petition to vacate the decree of divorce obtained in the suit so brought, in substance

that the court had only an apparent and not a real jurisdiction of the libel. *Sampson v. Sampson*, 451.

On the evidence at the hearing of the above petition, it was held that the court, by reason of the gross fraud by which it was attempted to make the court an instrument of oppression and to deprive the libellee of the opportunity to present her just defence to the libel, acquired no jurisdiction of the case, and it was ordered that the decrees *nisi* and absolute be vacated and that the libel be dismissed. *Ibid.*

The fact that, after procuring a decree absolute of divorce, a man married again and the second wife became thereby the mother of a child, was held not to bar a vacation of the decree of divorce where it appeared that it had been procured by fraud practiced by the husband upon the former wife and upon the court. *Ibid.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

MEMORANDUM.

Memorandum of findings of fact by a judge who heard a suit in equity is a part of the record on appeal. *Corkery v. Dorsey*, 97.

MISTAKE.

Suit in equity to correct mistake in deed, see appropriate subtitle under EQUITY JURISDICTION.

MORTGAGE.

Of Personal Property.

Demurrer to a declaration in an action of contract by a mortgagee of personal property against an insurance company upon a policy of fire insurance payable in case of loss to another person and the plaintiff as their interest might appear was sustained because there was no allegation to indicate what interest, if any, the other payee had in the proceeds due under the policy and no allegation of the total value of the goods covered by the policy that had been destroyed or damaged. *Frisbee v. Prussian National Ins. Co.* 159.

Of Real Estate.

Foreclosure.

In a suit in equity by a mortgagor of real estate to enjoin the mortgagee from suing the plaintiff for the balance due on the mortgage note after applying toward its payment the proceeds of a foreclosure sale, where the plaintiff has alleged that the sale was not conducted fairly and in good faith and that if it had been so conducted the proceeds would have been more than suffi-

Mortgage (continued).

cient to pay the note in full, the burden rests upon the plaintiff to prove these allegations. *Taylor v. Weingartner*, 243.

A mortgagee of real estate in making a foreclosure sale under a power contained in the mortgage not only must comply with the literal terms of the power but also is bound to use reasonable diligence to protect the rights and interests of the original mortgagor and also those of the owner of the equity of redemption to whom the mortgagor sold the property after making the mortgage. *Ibid.*

Mere facts, that the mortgagee of real estate was the only bidder at a foreclosure sale and that the property brought less than its market value, were held not to make the sale invalid nor afford ground to the original mortgagor for maintaining a suit in equity against the mortgagee to enjoin him from suing for the balance due on the mortgage note after applying toward its payment the proceeds of the sale. *Ibid.*

It cannot be ruled as matter of law that notice by publication should have been given of a two weeks' adjournment of a foreclosure sale of real estate under a power in a mortgage, where ample notice was given of the time originally fixed for the sale and the adjournment was made by a proclamation of the auctioneer at that time. *Ibid.*

Taxation.

A resident of another State, who is the mortgagee under a mortgage of real estate in this Commonwealth, has an interest in the real estate that at his death is subject to a succession tax under St. 1912, c. 678, § 1. *Hawkrigde v. Treasurer & Receiver General*, 134.

MOTIVE.

Improper motive of the plaintiff in a suit in equity prevented him from recovering costs. *Corkery v. Dorsey*, 97.

MUNICIPAL CORPORATIONS.

Charter.

Construction of the charter of Lowell, St. 1911, c. 645, as to a referendum vote on an order of the council to extend a street. *Kelty v. City Clerk of Lowell*, 369.

Mayor.

Under the circumstances under which a mayor of a city, being about to undergo an operation, signed a paper purporting to be an appointment of a certain officer and afterwards, having survived the operation, caused the name of the person named as appointee to be erased on the paper and the name of another person to be inserted in its place, it was held that the first proposed conditional appointment never took effect and that a vacancy existing when the paper first was signed could be filled by the appointment of the person whose name was inserted in place of the name erased. *Brogan v. Mayor of Lawrence*, 196.

Officers and Agents.

The surveyor of highways of a city, who also is its superintendent of streets, in constructing a system of underground drains and catch basins for the pur-

pose of disposing of surface water collecting upon the streets of the city in order to keep such streets reasonably safe and convenient for travel, is a public officer discharging a public duty and is not an agent of the city. *Dupuis v. Fall River*, 73.

Where a town, which had not authorized the election of road commissioners or a surveyor of highways, voted "That the board of selectmen be instructed to employ a competent engineer, who shall be a practical road builder, as superintendent of streets," such vote had merely an advisory, and no mandatory effect. *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

A member of a licensing board appointed under R. L. c. 100, § 4, is not required to take an oath of office in order to qualify. *Brogan v. Mayor of Lawrence*, 196.

Under the circumstances under which a mayor of a city, being about to undergo an operation, signed a paper purporting to be an appointment of a certain officer and afterwards, having survived the operation, caused the name of the person named as appointee to be erased on the paper and the name of another person to be inserted in its place, it was held that the first proposed conditional appointment never took effect and that a vacancy existing when the paper first was signed could be filled by the appointment of the person whose name was inserted in place of the name erased. *Ibid.*

It was held proper to grant a writ of mandamus to compel recognition of a member of the licensing board of the city of Lawrence so appointed by the mayor. *Ibid.*

Where the selectmen and the superintendent of construction of streets of a town merely have given notice to a landowner to remove within thirty days all trees, fences and other property from a certain portion of his land, there is no occasion to grant a petition of the landowner for a writ of prohibition to restrain the assessment of betterments. *Smith v. Selectmen of Norwood*, 222.

A hoseman stationed at an engine house in the city of Boston, who is a member of the fire department of that city, is not a laborer, a workman or a mechanic within the meaning of St. 1913, c. 807, § 1, which provides that a city accepting that statute shall pay compensation in the manner provided in the workmen's compensation act to "laborers, workmen and mechanics employed by it." *Demey's Case*, 270.

A contract with a city, to perform the duties of a teacher of manual training in the public schools of the city at a fixed salary, is a contract for the personal services of the teacher requiring his individual judgment and ability and is subject to the implied condition that the teacher shall be alive and able to do the work, and therefore is terminated by the teacher's death. *Donlan v. Boston*, 285.

Alien Labor.

The provisions of St. 1909, c. 514, § 21, as amended by St. 1914, c. 474, and St. 1914, c. 600, relating to the giving of preference in public works to citizens of the Commonwealth, do not violate any right protected by the Constitution of the United States or secured by any treaty with any foreign nation. *Lee v. Lynn*, 109.

Referendum.

Construction of the charter of Lowell, St. 1911, c. 645, as to a referendum vote on an order of the council to extend a street. *Kelty v. City Clerk of Lowell*, 369.

Superintendent of Streets.

The surveyor of highways of a city, who also is its superintendent of streets, in constructing a system of underground drains and catch basins for the purpose of disposing of surface water collecting upon the streets of the city in order to keep such streets reasonably safe and convenient for travel, is a public officer discharging a public duty and is not an agent of the city. *Dupuis v. Fall River*, 73.

Where a town, which had not authorized the election of road commissioners or a surveyor of highways, voted "That the board of selectmen be instructed to employ a competent engineer, who shall be a practical road builder, a superintendent of streets," such vote had merely an advisory, and no mandatory effect. *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

Under R. L. c. 25, § 86, a superintendent of streets, appointed by the selectmen of a town which has not authorized the election of road commissioners or a surveyor of highways, although he acts "under the direction of the selectmen," has the powers, performs the duties and is subject to the liabilities and penalties of surveyor of highways and road commissioners, and therefore he is a public officer and is not an agent of the town. *Ibid*.

Evidence that the superintendent of streets worked under the direction of the selectmen was held not to be relevant or material in such an action. *Ibid*.

On a review of the evidence at the trial of an action of tort by a landowner against a town for injuries caused by the flooding of the plaintiff's land caused by the overflowing, at the time of an unusual rainstorm, of a natural watercourse into which the town had caused surface drainage from streets to be emptied, it was held that, if there were any negligence causing the damage to the plaintiff, it was negligence of the superintendent of streets, who under R. L. c. 25, § 86, was a public officer for whose negligence the town was not liable. *Ibid*.

Fire Department.

A hoseman stationed at an engine house in the city of Boston, who is a member of the fire department of that city, is not a laborer, a workman or a mechanic within the meaning of St. 1913, c. 807, § 1, which provides that a city accepting that statute shall pay compensation in the manner provided in the workmen's compensation act to "laborers, workmen and mechanics employed by it." *Devney's Case*, 270.

Where a town has voted to purchase a fire engine and makes an appropriation for the purpose but does not designate the part of the town where the engine shall be kept and used, it is within the power of the board of fire engineers under R. L. c. 32, § 45, to determine at what fire station in the town the engine so purchased shall be placed and maintained. *Pope v. Berry*, 473.

Surface Drainage.

One, whose land is damaged by water overflowing upon it from a highway in a city by reason of the arrangements made by the surveyor of highways of the city for the disposal of surface water at a street junction adjoining the land, cannot maintain a suit in equity against the city for an injunction or for damages. *Dupuis v. Fall River*, 73.

On a review of the evidence at the trial of an action of tort by a landowner against a town for injuries caused by the flooding of the plaintiff's land caused by the overflowing, at the time of an unusual rainstorm, of a natural watercourse into which the town had caused surface drainage from streets to be emptied, it was held that, if there were any negligence causing the damage to the plaintiff, it was negligence of the superintendent of streets, who under R. L. c. 25, § 86, was a public officer for whose negligence the town was not liable. *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

Evidence that the superintendent of streets worked under the direction of the selectmen was held not to be relevant or material in such an action. *Ibid*.

Construction and Maintenance of Bridges.

The decision in Boston, petitioner, 221 Mass. 468, that St. 1911, c. 581, as amended by St. 1913, c. 341, is constitutional, was affirmed. *Boston, petitioner*, 36.

Defects in Ways.

Liability of municipalities for defects in highways, see appropriate subtitle under WAY.

MUNICIPAL COURT OF THE CITY OF BOSTON.

A judge of the Municipal Court of the City of Boston, at the trial before him of an action of contract, rightly may refuse to make a ruling that "Upon all the evidence the finding should be for the defendant," if there is evidence on which he can and does find for the plaintiff. *Wyche v. Uebelhoer*, 353.

NANTASKET BEACH.

A certain strip of land at Nantasket Beach in the town of Hull between the eastern side of Franklin Street and the ocean is free from a restriction prohibiting the erection of any structures thereon, except the portion of such strip of land which is on the easterly side of Beach Avenue, and that avenue extends southerly to the line of the southerly side of Quincy Street produced, the part of the premises between Beach Avenue and the ocean being subject to the restriction that no building or structure shall be placed or erected thereon and that it "shall be forever kept open and unobstructed for public use and enjoyment." *Hobart v. Weston*, 161.

NATIONAL BANK.

Under St. 1909, c. 490, Part III, §§ 11, 20, 41, 43, the tax commissioner, in determining the amount of the franchise tax to be levied upon a domestic business corporation owning shares of stock in national banks, should refuse to make deductions of the value of these shares under § 41. *A. J. Tower Co. v. Commonwealth*, 371.

This rule does not violate U. S. Rev. Sts. § 5219. *Ibid*.

In deciding the points stated above it was assumed, without deciding it, that the payment of the property tax upon the shares of national bank stock owned by the plaintiff, a domestic business corporation, was valid. *Ibid*.

NEGLIGENCE.

Due Care of Plaintiff.

- Of woman real estate agent showing a cellar to a prospective tenant. *Murphy v. Cohen*, 54.
- Of a deaf woman run into from behind by a street railway car. *Brereton v. Milford & Uxbridge Street Railway*, 130.
- Of a brakeman upon a coal car in a railroad yard maintained by a coal company. *Cross v. Boston & Maine Railroad*, 144.
- Of a traveller who stumbled upon a grade stake in a highway undergoing repairs. *McCarthy v. Stoneham*, 173.
- Of a milkman who stumbled upon a stake left in a private way during the abolition of a grade crossing. *Coles v. Boston & Maine Railroad*, 408.
- Of a child running to street railway tracks from a watering trough where he had been playing with other boys. *Kelley v. Boston & Northern Street Railway*, 449.
- Under St. 1914, c. 553, of a child rolling a hoop upon a highway and run into by an automobile. *Patrick v. Deziel*, 505.
- Of an employee of a store in crossing a street in front of the store on a plank covering substituted by a contractor employed by the Boston Transit Commission for the pavement. *Stewart v. Hugh Nawn Contracting Co.* 525.
- Of a driver of four horses entering a street upon which were street car tracks from a private street not crossing it. *Driscoll v. Boston Elevated Railway*, 533.

Due Care of Plaintiff's Decedent.

- Of a man run over by an ice wagon at a street corner. *Walker v. Gage*, 179.
- In an action by an administrator against a gas company under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for negligently causing the death of the plaintiff's intestate by permitting gas to enter the pipes in a tenement, it was held that the evidence disclosed no circumstances from which it could be inferred that the intestate was actively in the exercise of due care as required by the statute. *Ashton v. Fall River Gas Works Co.* 20.
- Person standing reading a newspaper near railroad tracks away from a station and killed by a passing train was held not to have been in the exercise of due care. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.
- Administrator of the estate of a woman, running or walking rapidly diagonally across a street in front of a street car ten feet away from her, was held not to be able to maintain an action against the street railway corporation under St. 1906, c. 463, as amended by St. 1907, c. 392, for negligently causing her death, there being no evidence that she was in the active exercise of reasonable care for her safety. *Welsh v. Concord, Maynard & Hudson Street Railway*, 184.
- One driving an automobile upon a grade crossing of a railroad with a travelled way was held under the circumstances not to have been exercising care. *Fogg v. New York, New Haven, & Hartford Railroad*, 444.
- It also was held that the driver's wife, who was beside him in the automobile, was wanting in due care. *Ibid.*

Assumption of Risk.

Provisions of a pass in writing accepted and used by a person on a vessel lying in dock were held to prevent him from maintaining an action against the owner of the vessel for injuries caused by a heavy roll of canvas being recklessly thrown down upon him by the owner's servants when he was on the main deck. *Freeman v. United Fruit Co.* 300.

The contract contained in such a pass was held not void as contrary to public policy of the law. *Ibid.*

In an action of tort by an employee against his employer for personal injuries, the defence that there was a contractual assumption of the risk of the injury may be relied on without being set up affirmatively in the answer. *Cuozzo v. Clyde Steamship Co.* 521.

At the trial of an action by an employee against his employer for personal injuries caused by the breaking of a movable skid over which it was the plaintiff's duty to haul a loaded hand truck, it was held that the evidence showed a contractual assumption by the plaintiff of the risk of injury from the breaking of the skid, and that therefore he could not recover. *Ibid.*

Invited Person.

A milkman who leaves his wagon and goes on foot to deliver milk at the house of a customer that abuts on a sidewalk of a private street which is open to the use of abutters, although the adjoining roadway is closed to travel, is using the sidewalk by invitation, not only when he is delivering the milk, but also after he has left it and when he is walking along the sidewalk on his way back to his wagon. *Coles v. Boston & Maine Railroad*, 408.

Licensee.

A tailor, who is sent for by the wireless telegraph operator on a vessel lying in port to bring on board a uniform that he has made for the operator to be tried on, and who is injured by a heavy bundle of canvas being dropped upon him from a great height, having been permitted to come on board the vessel for his own pecuniary gain, is a mere licensee, and the company owning and operating the vessel owes to him while on board merely the duty to refrain from wilfully or recklessly injuring him. *Freeman v. United Fruit Co.* 300.

In an action for injuries received in the manner above described, it is evidence for a jury of wilful, wanton or reckless conduct on the part of the servants of the owner of the vessel, that a roll of canvas, which struck the plaintiff while he was on the main deck and broke his leg, was thrown deliberately over the rail from the upper or boat deck without the slightest consideration for the safety of whomsoever might be in the path of the canvas as it descended. *Ibid.*

Provisions of a pass in writing accepted and used by a person on a vessel lying in dock were held to prevent him from maintaining an action against the owner of the vessel for injuries caused by a heavy roll of canvas being recklessly thrown down upon him by the owner's servant when he was on the main deck. *Ibid.*

The contract contained in such a pass was held not void as contrary to public policy of the law. *Ibid.*

Trespasser.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way. *Patrick v. Deziel*, 505.

Where the agent of a manufacturer of automobiles had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, an employee who at the invitation of a chauffeur was riding in such a car when a collision occurred and he was injured was held to be in the position of a trespasser to whom the employer owed no duty of care. *Walker v. Fuller*, 566.

Of Child.

On the evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff, a boy between five and six years of age, in 1910 during daylight was run into by a street car of the defendant when he ran across a street to the defendant's tracks from a watering trough where he had been playing with other boys, it was held that it was proper to order a verdict for the defendant at the close of the plaintiff's evidence. *Kelley v. Boston & Northern Street Railway*, 449.

On the evidence at the trial of an action against the owner and driver of an automobile by a boy who, after the enactment of St. 1914, c. 553, when twelve years of age and while playing at rolling a hoop on a public way in a city, was run into from behind by the automobile, it was held that it could not be ruled as a matter of law that the defendant had overcome the presumption of due care of the plaintiff raised by St. 1914, c. 553. *Patrick v. Deziel*, 505.

Whether the conduct of the plaintiff was a violation of an ordinance of the city was held to be a question for the jury, so that it could not be ruled as a matter of law that the only duty owed to the plaintiff by the defendant was to refrain from wanton and reckless misconduct. *Ibid*.

Of Person in Care of Child.

Girl ten years of age in charge of her small brother who was struck and injured by a loose guy wire or wire cable swinging from a telegraph pole was held, in an action by the boy against the telegraph company maintaining the wire for his injuries so sustained, to have been in the exercise of as much care and prudence in the protection of her brother as reasonably might be expected on the part of a girl of her age. *Fry v. Postal Telegraph Cable Co.* 496.

Employer's Liability.

Effect of workmen's compensation act.

The provision of St. 1911, c. 751, Part I, § 1, that in an action to recover damages for personal injury sustained by an employee in the course of his employment it shall not be a defence, that the employee was negligent, that the injury was caused by the negligence of a fellow employee or that the employee had assumed the risk of the injury, has no bearing on what constitutes negligence on the part of an employer. *Walsh v. Turner Centre Dairying Association*, 386.

Assumption of risk by employee.

In an action of tort by an employee against his employer for personal injuries, the defence that there was a contractual assumption of the risk of the injury may be relied on without being set up affirmatively in the answer. *Cuozzo v. Clyde Steamship Co.* 521.

At the trial of an action by an employee against his employer for personal injuries caused after the enactment of the workmen's compensation act by the breaking of a movable skid over which it was the plaintiff's duty to haul a loaded hand truck, it was held that the evidence showed a contractual assumption by the plaintiff of the risk of injury from the breaking of the skid, and that therefore he could not recover. *Ibid.*

Violation of employer's rule by employee.

Where the agent of a manufacturer of automobiles had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, an employee who at the invitation of a chauffeur was riding in such a car when a collision occurred and he was injured was held to be in the position of a trespasser to whom the employer owed no duty of care. *Walker v. Fuller*, 566.

Ways, works or machinery.

A portable skid, adapted for use in difficult places and in use by a steamship corporation between a street and the end of a permanent platform over which from a steamship longshoremen employed by the corporation wheel loaded hand trucks, is not a part of the ways, works or machinery of the corporation. *Cuozzo v. Clyde Steamship Co.* 521.

Superintendence.

Employee of the proprietor of a lumber yard, who was injured by the falling upon him of a temporary lumber pile as he was assisting in loading a plank from the pile to a wagon, was held, under the circumstances, not able to recover for his injuries in an action against his employer under the employers' liability act based upon alleged negligence of a superintendent. *Lynch v. C. J. Larivee Lumber Co.* 335.

In the case above described, it also was held that there was no evidence that the injury to the plaintiff was attributable to any act or default of a tallyman, who had given directions to the plaintiff, in connection with any matter over which he had or had assumed to have power of superintendence. *Ibid.*

In an action by an employee against his employer for personal injuries caused by the breaking of a movable skid over which it was the plaintiff's duty to haul a loaded hand truck, where the evidence showed a contractual assumption by the plaintiff of the risk of injury from the breaking of the skid, it was held that the question of the liability of the defendant would not be affected by the fact that a superintendent of the defendant was negligent in selecting and placing the skid for use by the plaintiff. *Cuozzo v. Clyde Steamship Co.* 521.

Defective and dangerous machinery and appliances.

It is a settled rule that, in an action to enforce liability for a defendant's negligence in failing to keep appliances in proper repair and condition, evidence

Negligence (*continued*).

of subsequent acts in taking additional precautions to prevent other accidents is not admissible for the purpose of showing that such precautions were needed at the time of the accident. *Albright v. Sherer*, 39.

In an action by a farm hand against his employer for personal injuries caused by the tipping over of a wagon of the defendant loaded with wood, where the jury in answer to special questions submitted to them found that the condition of the king-pin was defective but that this condition was not a cause of the accident and the judge ordered a verdict for the defendant, it was held, on an examination of the evidence, that there was no evidence of a defect in the wagon other than one in the king-pin and that the verdict was ordered properly. *Ibid*.

In an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube it was held, that the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury. *Souden v. Fore River Ship Building Co.* 509.

At such trial, the fact that the explosion occurred while the boiler was being subjected to the use for which it was designed was held to be in itself evidence of a defective condition. *Ibid*.

It also was held that, while the plaintiff was bound to offer evidence to show that the explosion was caused by negligence of the defendant, he was not required to point out the particular act or omission which caused the accident. *Ibid*.

It also was held that proper inspection of the boiler tubes was, in the present case, a duty of the defendant which could not be delegated, so that, if the performance of that duty was left by the defendant to a fellow servant of the plaintiff's intestate who was negligent and whose negligence caused the death, the defendant would be liable. *Ibid*.

It also was held that, upon the evidence in the present case, the question, whether there had been negligence in the performance of the duty of inspection, was for the jury. *Ibid*.

At the trial of an action by an employee against his employer for personal injuries caused by the breaking of a movable skid over which it was the plaintiff's duty to haul a loaded hand truck, it was held that the evidence showed a contractual assumption by the plaintiff of the risk of injury from the breaking of the skid, and that therefore he could not recover. *Cuozzo v. Clyde Steamship Co.* 521.

It also was held that, under the circumstances above stated, the question of the liability of the defendant would not be affected by the fact that a superintendent of the defendant was negligent in selecting and placing the skid for use by the plaintiff. *Ibid*.

Dangerous place.

A railroad company is under no duty to point out to an experienced brakeman in its employ the existence, in a railroad yard on property of a coal company where the brakeman was in the course of his employment, of a post about three feet from a track, nor to warn him of its existence. *Cross v. Boston & Maine Railroad*, 144.

And, since the enactment of the workmen's compensation act as before, if it appears that the post was placed, constructed and maintained by the coal company, there can be no recovery from the railroad corporation, not a subscriber under the act, in an action by such an employee against it for injuries

caused by his being crushed between the post and a coal car although such injuries were due to ignorance resulting from a lack of instruction or warning as to the post and by the dangerous condition of the premises arising from its maintenance where it was. *Cross v. Boston & Maine Railroad*, 144.

Nor, under such circumstances, where it also appears that one cause of the accident was the fact that a light, which customarily had shone upon the post against which the plaintiff was crushed, had been suffered to be unlighted, can the railroad company be held liable for the injuries if the coal company had undertaken the duty of keeping the yard lighted. *Ibid*.

A workman in a lumber yard cannot recover in an action at common law against his employer for injuries, received by him, while loading lumber from a pile to a wagon, before the workmen's compensation act went into effect, and caused by improper construction of the pile, if it appears that the piling was done by his fellow servants. *Lynch v. C. J. Larivee Lumber Co.* 335.

If a milk dealer employs a servant to deliver milk on premises not belonging to the employer or within his control, and such servant is injured by falling down an elevator well in a building to which he was sent by his employer to deliver milk, the servant can recover from his employer for such injuries only by showing that the place was dangerous and that the employer had knowledge or reason to know of the danger and reason to believe that the servant was ignorant of it. *Walsh v. Turner Centre Dairying Association*, 386.

Fellow servants.

A workman in a lumber yard cannot recover in an action at common law against his employer for injuries, received by him, while loading lumber from a pile to a wagon, before the workmen's compensation act went into effect, and caused by improper construction of the pile, if it appears that the piling was done by his fellow servants. *Lynch v. C. J. Larivee Lumber Co.* 335.

Employer's liability for injury on high seas.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

Street Railway.

Persons on highway.

Where a boy in crossing a street was on the top of a bank of earth that had been dug from a trench by the side of the track, and where the forward part of a car on the track passed the boy, when his foot slipped on the loose earth and he came in contact with the car and was injured, it was held, that there was no evidence of negligence on the part of the motorman operating the car. *Selibede v. Worcester Consolidated Street Railway*, 76.

The fact that a street railway car, in passing a boy who was standing on a bank of earth, created a current of air is not evidence of an undue rate of speed. *Ibid*.

Evidence in the above action that the street railway car was going "fast" without any other indication of its rate of speed and without regard to the conditions existing at the time is too uncertain and indefinite to warrant a

Negligence (*continued*).

finding of negligent or improper operation. *Selibedeo v. Worcester Consolidated Street Railway*, 76.

In an action against a street railway company by a deaf woman fifty-two years of age for personal injuries caused by her being run into from behind by a car of the defendant, it was held that there was evidence for the jury that the plaintiff was in the exercise of due care and that the defendant was negligent. *Brereton v. Milford & Uxbridge Street Railway*, 130.

Administrator of the estate of a woman running or walking rapidly diagonally across a street in front of a street car ten feet away from her was held not to be able to maintain an action against the street railway corporation under St. 1906, c. 463, as amended by St. 1907, c. 392, for negligently causing her death, there being no evidence that she was in the active exercise of reasonable care for her safety. *Welsh v. Concord, Maynard & Hudson Street Railway*, 184.

In an action against a street railway corporation for personal injuries sustained in consequence of a collision between a car of the defendant and a coach in which the plaintiff was a passenger, which occurred on a square in a city crossed by intersecting streets, evidence of a customary stopping of cars of the defendant at this square even when there were no passengers to get on or off, was held admissible as having a tendency to show that such stopping was because of the danger from the intersecting streets and to protect travellers on the highway. *Godfrey v. Old Colony Street Railway*, 419.

In the same case it was held that evidence in behalf of the plaintiff was admissible to show that the car was late, from which and other circumstances in the case it might be inferred that the motorman in striving to make up lost time was going at an unusual rate of speed. *Ibid*.

It also was held that evidence was admissible to show that the trolley came off before reaching the place of the accident, this tending to explain a cause of the delay. *Ibid*.

In the same case in connection with other evidence as to the severity of the impact, it was held that a witness for the plaintiff properly was allowed to testify that his father, who was driving the coach, was killed by the collision, it not appearing that the evidence was introduced for the purpose of creating a prejudice against the defendant on a collateral issue. *Ibid*.

On the evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff, a boy between five and six years of age, in 1910 during daylight was run into by a street car of the defendant when he ran across a street to the defendant's tracks from a watering trough where he had been playing with other boys, it was held that it was proper to order a verdict for the defendant at the close of the plaintiff's evidence. *Kelley v. Boston & Northern Street Railway*, 449.

It was held that at the trial of an action against a corporation operating a street railway in Boston for personal injuries sustained by reason of the plaintiff being thrown to the ground from the seat of a wagon from which he was driving four horses and was proceeding from a private way into Commercial Street when the wagon was struck by a car of the defendant, there was evidence that the plaintiff was in the exercise of due care. *Driscoll v. Boston Elevated Railway*, 533.

Although the private way was not a cross street and under the street regulation the defendant's car had the right of way, such right was one of precedence and not of exclusive enjoyment, and, whether it was reasonably practicable

for the plaintiff to drive out from the private way in any other manner than by crossing the defendant's tracks and thus whether the regulation was violated, were questions of fact. *Driscoll v. Boston Elevated Railway*, 533.

In the same action it was held it could not be ruled as matter of law that the defendant's motorman was not negligent, but that the question of his negligence was for the jury. *Ibid.*

Passenger.

In an action against a street railway corporation for personal injuries sustained when the plaintiff was a passenger in a car of the defendant by reason of the heel of her boot catching between the iron guides on the threshold, where the car was a new one and the plaintiff did not contend that it was in any way out of order, the mere happening of the accident is no evidence in itself of negligence on the part of the defendant. *Perkins v. Bay State Street Railway*, 235.

The use by a street railway corporation in a semi-convertible car of an iron threshold having guides a quarter of an inch high between which the door of the car slides, such thresholds having been in common use for a number of years on other street railway systems, combined with the fact that a woman passenger in leaving the car caught the heel of her boot between the iron guides and was injured, furnishes no evidence of negligence in an action by such passenger against the corporation for her injuries. *Ibid.*

Where, at the trial of an action of tort against a street railway corporation for personal injuries alleged to have been received when a street car of the defendant suddenly started and caused the plaintiff, who was in the act of alighting, to be thrown to the street, there is direct and inferential evidence from which findings are warranted that the car started in response to a starting signal and that such signal was not given by any one else than the conductor, a further finding is warranted that the signal was given by the conductor although there is no direct evidence to that effect. *Fitzpatrick v. Boston Elevated Railway*, 475.

In the above case there also was evidence from which the jury would have been warranted in finding that the car started or jerked after it had come to a full stop for passengers to alight and while the plaintiff was alighting, and that such movement of the car was due to negligence of the motorman in acting without any signal, and it was held that a finding of the jury for the plaintiff was justified. *Ibid.*

Woman passenger standing upon the platform of a terminal station of an elevated railway and injured in the course of playful boxing between two employees of the railway company, who had finished their work for the day and were waiting to take a car home or elsewhere for their own purposes, was held unable to recover from the company because the two men were not in a legal sense its servants or employees when their negligent acts were committed. *Langley v. Boston Elevated Railway*, 492.

Evidence at the trial of an action by a woman, against a corporation operating street and elevated railways, for personal injuries alleged to have been sustained by reason of a car of the defendant running into the rear of another car of the defendant in which the plaintiff was a passenger, where it appeared that the plaintiff at most was but slightly bruised, was held to warrant a finding that the injuries received by the plaintiff were not wholly mental, but were physical injuries for which she was entitled to recover damages together

Negligence (*continued*).

with damages for mental suffering that arose out of or accompanied such physical injuries. *McCarthy v. Boston Elevated Railway*, 568.

Upon the facts in evidence at the above trial, it was held to have been proper for the presiding judge to refuse to give an instruction to the jury as to it not being the duty of the defendant to anticipate an injurious result which would happen only to a person of peculiar sensitiveness, irrespective of the question whether the ruling requested would be a correct one if it were applicable to the facts of the case, because the instruction was inapplicable. *Ibid*.

On evidence at the trial of the above action as to hysteria suffered by the plaintiff, it was held that there was evidence warranting a finding that the plaintiff was injured permanently. *Ibid*.

Railroad.

A person, who, while standing upon a portion of the premises of a railroad corporation separated from a station without an express or implied invitation by the corporation, waiting for a train and not looking nor listening for a train, was struck and killed by a train, was not in the exercise of due care and, since he was not a passenger, no action for causing his death could be maintained under St. 1906, c. 463, Part I, § 63. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.

A railroad company is under no duty to point out to an experienced brakeman in its employ the existence, in a railroad yard on property of a coal company where the brakeman was in the course of his employment, of a post about three feet from a track, nor to warn him of its existence. *Cross v. Boston & Maine Railroad*, 144.

And, since the enactment of the workmen's compensation act as before, if it appears that the post was placed, constructed and maintained by the coal company, there can be no recovery from the railroad corporation, not a subscriber under the act, in an action by such an employee against it for injuries caused by his being crushed between the post and a coal car although such injuries were due to ignorance resulting from a lack of instruction or warning as to the post and by the dangerous condition of the premises arising from its maintenance where it was. *Ibid*.

Action by a milkman for injuries caused by a stake left protruding in a sidewalk during the abolition of a grade crossing of a railroad with a private way. *Coles v. Boston & Maine Railroad*, 408.

Verdicts were ordered for the defendant in actions against a railroad company for causing the death at a grade crossing of a man and his wife in an automobile because the plaintiffs were not in the active exercise of care. *Fogg v. New York, New Haven, & Hartford Railroad*, 444.

Under the circumstances it was held to have been improper for the judge presiding at the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a highway between a train of the defendant and an automobile driven by the plaintiff, to read to the jury in his charge certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. *Rothwell v. New York, New Haven, & Hartford Railroad*, 550.

In Use of Highway or of Private Way.

Whether skidding of an automobile on a curve of a crowned road that was wet was due to negligence of the driver was held to be a question for the jury. *Loftus v. Pelletier*, 63.

The question, whether a traveller on foot on a highway, who was tripped by a grade stake negligently left protruding where the highway was being repaired, was negligent, was held to have been for the jury. *McCarthy v. Stoneham*, 173.

It was held that, at the trial of an action by an administrator for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by his having been run over at a street crossing on an afternoon late in November by an ice wagon negligently driven by an employee of the defendant, there was evidence of negligence of the driver and of the due care of the plaintiff's intestate required by R. L. c. 171, § 2, as amended by St. 1907, c. 375. *Walker v. Gage*, 179.

Administrator of the estate of a woman running or walking rapidly diagonally across a street in front of a street car ten feet away from her was held not to be able to maintain an action against the street railway corporation under St. 1906, c. 463, as amended by St. 1907, c. 392, for negligently causing her death, there being no evidence that she was in the active exercise of reasonable care for her safety. *Welch v. Concord, Maynard & Hudson Street Railway*, 184.

A corporation engaged as a contractor in building a section of the Dorchester tunnel under a contract with the Boston Transit Commission as authorized by St. 1911, c. 741, § 17, has a right to use the part of the public streets necessary for the performance of its contract, but in doing so it is not relieved from the duty of using proper care in performing its contract and is liable for an injury caused by its negligence to a traveller on the highway in the exercise of due care. *Murphy v. Hugh Nawn Contracting Co.* 404.

Consequently such a contractor has a right in the course of its work to place a timber on the sidewalk of a street, but in doing so it must take precautions by barriers, signs or other adequate means to protect the travelling public from harm. *Ibid.*

In the case stated above it was held to be a misleading error for the presiding judge to instruct the jury that, "if the plaintiff has satisfied you that the defendant placed there on the sidewalk something that was likely to have caused the injury, that was a nuisance," and that "the defendant had no right to place an obstruction there." *Ibid.*

Evidence at the trial of such an action upon which it was held that the jury were warranted in finding that an unguarded plank which caused the plaintiff's injuries was placed where it was by the servants of the defendant acting within the scope of their authority. *Ibid.*

One who would be liable for an injury caused by his negligently driving a stake in the sidewalk of a private street and leaving it there at night projecting above the surface unguarded and unlighted, also would be liable for negligently driving and leaving in like manner a stake projecting in the travelled path at a point where a former fence stood on the land of an abutter adjoining the sidewalk if the presence of the stake made travelling on the sidewalk dangerous. *Coles v. Boston & Maine Railroad*, 408.

Evidence, at the trial of actions by a milkman against a railroad corporation,

Negligence (continued).

whose engineer in the changing of the grade of a private street during the abolition of a grade crossing unnecessarily and negligently drove a stake into the beaten path of a sidewalk upon which the plaintiff stumbled, and against a contractor employed by the railroad corporation, was held to warrant a finding that the plaintiff was in the exercise of due care. *Coles v. Boston & Maine Railroad*, 408.

In an action against a street railway corporation for personal injuries sustained in consequence of a collision between a car of the defendant and a coach in which the plaintiff was a passenger, which occurred on a square in a city crossed by intersecting streets, evidence of a customary stopping of cars of the defendant at this square even when there were no passengers to get on or off, was held admissible as having a tendency to show that such stopping was because of the danger from the intersecting streets and to protect travellers on the highway. *Godfrey v. Old Colony Street Railway*, 419.

On the evidence at the trial of an action against a street railway company for personal injuries received when the plaintiff, a boy between five and six years of age, in 1910 during daylight was run into by a street car of the defendant when he ran across a street to the defendant's tracks from a watering trough where he had been playing with other boys, it was held that it was proper to order a verdict for the defendant at the close of the plaintiff's evidence. *Kelley v. Boston & Northern Street Railway*, 449.

Small boy, who was left by his sister standing on an uneven grass plot which is a part of a public highway that has no sidewalk and who was struck and injured by a loose guy wire or wire cable swinging from a telegraph pole, was held to have been in a place on the highway where he had a right to be. *Fry v. Postal Telegraph Cable Co.* 496.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way. *Patrick v. Deniel*, 505.

On the evidence at the trial of an action against the owner and driver of an automobile by a boy who, after the enactment of St. 1914, c. 553, when twelve years of age and while playing at rolling a hoop on a public way in a city, was run into from behind by the automobile, it was held that it could not be ruled as a matter of law that the defendant had overcome the presumption of due care of the plaintiff raised by St. 1914, c. 553, and that the questions, whether the plaintiff was guilty of contributory negligence, and whether the accident was caused by negligence of the defendant, were for the jury. *Ibid.*

Whether the conduct of the plaintiff was a violation of an ordinance of the city was held to be a question for the jury, so that it could not be ruled as a matter of law that the only duty owed to the plaintiff by the defendant was to refrain from wanton or reckless misconduct. *Ibid.*

It was held that at the trial of an action against a corporation operating a street railway in Boston for personal injuries sustained by reason of the plaintiff being thrown to the ground from the seat of a wagon from which he was driving four horses and was proceeding from a private way into Commercial Street when the wagon was struck by a car of the defendant, there was evidence that the plaintiff was in the exercise of due care. *Driscoll v. Boston Elevated Railway*, 533.

Although the private way was not a cross street and under the street regulation the defendant's car had the right of way, such right was one of precedence

and not of exclusive enjoyment, and, whether it was reasonably practicable for the plaintiff to drive out from the private way in any other manner than by crossing the defendant's tracks and thus whether the regulation was violated, were questions of fact. *Driscoll v. Boston Elevated Railway*, 533.

It also was held that it could not be ruled as matter of law that the defendant's motorman was not negligent, but that the question of his negligence was for the jury. *Ibid*.

It also was held that if the jury should find that a certain street regulation was violated by the plaintiff, it then would be a question of fact whether such violation was a proximate cause of the plaintiff's injury. *Ibid*.

Of Attorney at Law.

On a petition for a writ of review no relief will be given from results that naturally followed negligence of the petitioner's counsel in the preparation or the trial of the petitioner's case in the Superior Court. *Watson v. Wenz*, 341.

In Operation of Automobile.

In an action for personal injuries sustained by being thrown from an automobile alleged to have been operated negligently by the defendant, it was held to be a question for the jury whether a skidding of the automobile which resulted in its overturning was caused by the defendant's negligence in driving at the rate of more than thirty miles an hour in going round a sharp curve where the road was crowned and its surface was loose and wet. *Loftus v. Pelletier*, 63.

In an action by a district nurse against a physician for personal injuries received while in the defendant's automobile and caused by its negligent operation, it was held that it could not be ruled as matter of law that the relation of the plaintiff and the defendant at the time of such injuries was that of persons engaged in a common enterprise. *Ibid*.

Evidence at the trial of an action against a railroad company under St. 1907, c. 392, § 1, for the death of one who was run into by a train at a grade crossing was held not to warrant a finding that the decedent was in the active exercise of care for his safety. *Fogg v. New York, New Haven, & Hartford Railroad*, 444.

On the evidence at the trial of an action against the owner and driver of an automobile by a boy who, after the enactment of St. 1914, c. 553, when twelve years of age and while playing at rolling a hoop on a public way in a city, was run into from behind by the automobile, it was held that the questions, whether the plaintiff was guilty of contributory negligence and whether the accident was caused by negligence of the defendant, were for the jury. *Patrick v. Denial*, 505.

Whether the conduct of such boy was a violation of an ordinance of the city was held to be a question for the jury, so that it could not be ruled as a matter of law that the only duty owed to the plaintiff by the defendant was to refrain from wanton and reckless misconduct. *Ibid*.

Under the circumstances it was held to have been improper for the judge presiding at the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a

Negligence (continued).

highway between a train of the defendant and an automobile driven by the plaintiff, to read to the jury in his charge certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. *Rothwell v. New York, New Haven, & Hartford Railroad*, 550.

Where the agent of a manufacturer of automobiles had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, an employee who at the invitation of a chauffeur was riding in such a car when a collision occurred and he was injured was held to be in the position of a trespasser to whom the employer owed no duty of care. *Walker v. Fuller*, 566.

Of One controlling Real Estate.

A woman real estate agent, who, in attempting to show to a prospective tenant, with the permission of the owner, the cellar of a house that she never had entered before, fell down the stairs was held, under the circumstances to have suffered injury by reason of her own carelessness and to be unable to maintain an action against the owner of the building. *Murphy v. Cohen*, 54.

Tenant of an apartment in a tenement house, who was induced to remain a tenant because the landlord agreed to thaw out the pipes, was held to be entitled to maintain an action of tort against the landlord for damages resulting from a fire caused by negligence of the landlord in performing his agreement. *Franco v. Maker*, 71.

On the evidence at the trial of an action by the tenant of a store in a building against his landlord, who was the owner of the building, and in control of its roof and pipes, for damage to the plaintiff's goods alleged to have been caused by the negligence of the defendant in permitting a pipe or conductor leading from the roof to become leaky and out of repair, it was held that the plaintiff was entitled to go to the jury. *Hilden v. Naylor*, 290.

Under the circumstances, the owner of a building was held not to be liable to a sublessee for injuries caused by the fall of a dumb-waiter. *Green v. Hammond*, 318.

Where the owner of a house let to a single tenant at will has agreed to make general repairs during the tenancy and fails to keep his agreement, this does not make him liable in tort to the tenant for personal injuries sustained by the tenant by reason of the giving way of rotten steps that the owner has failed to repair after being told that they were "shaky" when apparently they were in good condition. *Lane v. Raynes*, 514.

Of One controlling Steamship.

Provisions of a pass in writing accepted and used by a person on a vessel lying in dock were held to prevent him from maintaining an action against the owner of the vessel for injuries caused by a heavy roll of canvas being recklessly thrown down upon him by the owner's servant when he was on the main deck. *Freeman v. United Fruit Co.* 300.

The contract contained in such a pass was held not void as contrary to public policy or the policy of the law. *Ibid.*

Action against the owner of a steamship for injuries sustained by a tailor, who was a mere licensee on the vessel on business of his own, by a roll of canvas being thrown upon him. *Freeman v. United Fruit Co.* 300.

At the trial of such action, it was proper for the defendant to ask one of its witnesses, who was a sailor on board the vessel, "whether or not a parcel of canvas one and a half feet thick" and from twelve to fourteen feet long, as described by the witness, "could have been conveniently carried down the stairways," this having some bearing on the question of recklessness. *Ibid.*

In the same action it was held that the plaintiff properly could put in evidence the orders given by the boatswain, in reply to an inquiry by one of the sailors whether the canvas was to be carried down or dropped down, "Throw it down; take a chance and throw it down." *Ibid.*

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

In an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube it was held that the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury. *Ibid.*

At such trial, the fact that the explosion occurred while the boiler was being subjected to the use for which it was designed was held to be in itself evidence of a defective condition. *Ibid.*

It also was held that, while the plaintiff was bound to offer evidence to show that the explosion was caused by negligence of the defendant, he was not required to point out the particular act or omission which caused the accident. *Ibid.*

It also was held that proper inspection of the boiler tubes was, in the present case, a duty of the defendant which could not be delegated, so that, if the performance of that duty was left by the defendant to a fellow servant of the plaintiff's intestate who was negligent and whose negligence caused the death, the defendant would be liable. *Ibid.*

It also was held that, upon the evidence in the present case, the question, whether there had been negligence in the performance of the duty of inspection, was for the jury. *Ibid.*

In construction of Subway.

A corporation engaged as a contractor in building a section of the Dorchester tunnel under a contract with the Boston Transit Commission as authorized by St. 1911, c. 741, § 17, has a right to use the part of the public streets necessary for the performance of its contract, but in doing so it is not relieved from the duty of using proper care in performing its contract and is liable for an injury caused by its negligence to a traveller on the highway in the exercise of due care. *Murphy v. Hugh Nawn Contracting Co.* 404.

Consequently such a contractor has a right in the course of its work to place a timber on the sidewalk of a street, but in doing so it must take precautions

Negligence (continued).

by barriers, signs or other adequate means to protect the travelling public from harm. *Murphy v. Hugh Naum Contracting Co.* 404.

In the case stated above it was held to be a misleading error for the presiding judge to instruct the jury that, "if the plaintiff has satisfied you that the defendant placed there on the sidewalk something that was likely to have caused injury, that was a nuisance," and that "the defendant had no right to place an obstruction there." *Ibid.*

Evidence at the trial of such an action upon which it was held that the jury were warranted in finding that an unguarded plank which caused the plaintiff's injuries was placed where it was by the servants of the defendant acting within the scope of their authority. *Ibid.*

On the evidence at the trial of an action of tort against a contractor, working under the Boston Transit Commission in the construction of the subway by authority of St. 1911, c. 741, for personal injuries received by the plaintiff when she was crossing Boylston Street where the defendant had substituted planking for the pavement, it was held that the question, whether the plaintiff's injury was caused by the defendant's negligence, was for the jury. *Stewart v. Hugh Naum Contracting Co.* 525.

The fact that, if the Boston Transit Commission itself had done the work above described, the city of Boston would not have been liable for its negligence because the commissioners were public officers, was held not to free the contractor from liability. *Ibid.*

Where, at such trial, the plaintiff has described a defective condition which she observed at the time of the accident and has testified that she observed the plank three weeks after the accident and that the condition was the same then as it was at the time of the accident, another witness, who saw the plank for the first time three weeks after the accident, may describe its condition at that time. *Ibid.*

Of Bailees.

It was held that the evidence at the trial of an action against a speedometer maker for damage to the plaintiff's automobile caused by the defendant negligently permitting it to be stolen when it had been entrusted to him to have its speedometer repaired entitled the plaintiff to go to the jury, as it could be found that the defendant had accepted the custody of the car as a bailee for hire and was bound to exercise due care for its safety and protection. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

In Maintenance of Dumb-waiter.

Where the lessee of an apartment has by the terms of his lease the right to the exclusive enjoyment and control of a dumb-waiter, the lessor is not required to inspect the dumb-waiter or to keep it in repair. *Green v. Hammond.* 318.

The owner of a building containing apartments, who has leased the entire building to another and has retained no control over any part of it, cannot be held liable to a sublessee of an apartment for a want of repair in a dumb-waiter used in connection with that apartment. *Ibid.*

The unexplained fall of an ordinary dumb-waiter, which is operated by two ropes, connected with an apartment occupied by a tenant for whose purposes it is used exclusively, is no evidence of a defect in the condition of the dumb-waiter or of negligence in maintaining it. *Ibid.*

Causing Damage by Fire.

Tenant of an apartment in a tenement house, who was induced to remain a tenant because the landlord agreed to thaw out the pipes, was held to be entitled to maintain an action of tort against the landlord for damages resulting from a fire caused by negligence of the landlord in performing his agreement. *Franco v. Maker*, 71.

In Use of Gas.

In an action by an administrator against a gas company under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for negligently causing the death of the plaintiff's intestate by permitting gas to enter the pipes in a tenement, it was held that the evidence disclosed no circumstances from which it could be inferred that the intestate was actively in the exercise of due care as required by the statute. *Ashton v. Fall River Gas Works Co.* 20.

In Abolition of Grade Crossing.

A railroad corporation in making a change of grade ordered by a decree of court in proceedings for the abolition of a grade crossing is not protected from liability for an injury caused by its doing the work negligently on the ground that it was engaged in the performance of a public work, the abolition of such a crossing being largely for its own benefit. *Coles v. Boston & Maine Railroad*, 408.

In the foregoing case it appeared that, by the contract for doing the work of changing the grade of the private street, the time, manner and place of working were to be under the charge of the railroad corporation which had control and direction of the work for the purpose of complying with the decree of court addressed to it, and it was held that this made the railroad corporation responsible to the travelling public for negligence on the part of the contractor. *Ibid.*

Evidence, at the trial of actions by a milkman against a railroad corporation, whose engineer in the changing of the grade of a private street during the abolition of a grade crossing unnecessarily and negligently drove a stake into the beaten path of a sidewalk upon which the plaintiff stumbled, and against a contractor employed by the railroad corporation, was held to warrant findings that the plaintiff was in the exercise of due care and that each of the defendants was negligent. *Ibid.*

In Lumber Yard.

A workman in a lumber yard cannot recover in an action at common law against his employer for injuries, received by him, while loading lumber from a pile to a wagon, before the workmen's compensation act went into effect, and caused by improper construction of the pile, if it appears that the piling was done by his fellow servants. *Lynch v. C. J. Larivee Lumber Co.* 335.

Employee of the proprietor of a lumber yard, who was injured by the falling upon him of a temporary lumber pile as he was assisting in loading a plank from the pile to a wagon, was held, under the circumstances, not able to recover for his injuries in an action against his employer under the employers' liability act based upon alleged negligence of a superintendent. *Ibid.*

Negligence (continued).

It also was held that there was no evidence that the injury to the plaintiff was attributable to any act or default of a tallyman, who had given directions to the plaintiff, in connection with any matter over which he had or had assumed to have power of superintendence. *Lynch v. C. J. Larivee Lumber Co.* 335.

Of Plumber.

It is the duty of a plumber, whom the owner of a house has employed to install a hot water boiler in his basement to be supplied by a hot water coil in a heater which is a part of a hot water heating system, and to whom the owner has left entirely the plan and execution of the work, to perform the work in a workmanlike manner and with reasonable judgment, skill and care according to the approved usages of his trade. *Kelley v. Laraway*, 182.

In the above action, in which the owner of a house sought recovery from a plumber who was alleged to have failed to perform his duty as above described, it was held that there was evidence that the plumber had performed his work negligently, and that therefore it was proper to submit the case to a jury. *Ibid.*

In Railroad Yard on Premises other than those of Railroad Corporation.

A brakeman in the employ of a railroad corporation was crushed in a railroad yard of a coal company between a coal car upon which he was and a post too near the track upon which a light, customarily lighted by the coal company, had gone out, and brought actions to recover for his injuries against the railroad corporation and the coal company, and it was held that, under the circumstances, he could not recover against the railroad corporation. *Cross v. Boston & Maine Railroad*, 144.

And the coal company was held not liable for such injuries if they were caused by the employee not being warned of the presence of the post or by the post being constructed and maintained dangerously near to the railroad track. *Ibid.*

But where, under the foregoing circumstances, it also appeared that the coal company had assumed the duty of keeping the yard lighted at night, that the employee of the railroad company relied on such lighting to warn him of the presence of dangerous structures, that a light, which customarily had shone upon the post against which the employee of the railroad was crushed, had been suffered by an employee of the coal company, who was charged with the duty of keeping the lights in the yard in order, to be and to remain extinguished, and that the accident was caused by the absence of such light, the coal company was held liable for the injuries so received. *Ibid.*

Want of Light.

Actions by a railroad brakeman against the railroad corporation and a coal company for injuries caused by his being crushed in the night time in a railroad yard of the coal company between a coal car upon which he was and a post upon which customarily a light was kept shining but which at the time of the accident was unlighted. *Cross v. Boston & Maine Railroad*, 144.

Of Milkman.

Evidence, at the trial of actions by a milkman against a railroad corporation, whose engineer in the changing of the grade of a private street during the abolition of a grade crossing unnecessarily and negligently drove a stake into the beaten path of a sidewalk upon which the plaintiff stumbled, and against a contractor employed by the railroad corporation, was held to warrant a finding that the plaintiff was in the exercise of due care. *Coles v. Boston & Maine Railroad*, 408.

In Maintaining Wires.

In an action against a telegraph company by a child who was injured by having a loose guy wire or wire cable swing against his eye, it was held that it could be found that the defendant was negligent in failing to discover the condition of the wire and in allowing it to remain loose. *Fry v. Postal Telegraph Cable Co.* 496.

In Station.

Woman passenger standing upon the platform of a terminal station of an elevated railway and injured in the course of playful boxing between two employees of the railway company, who had finished their work for the day and were waiting to take a car home or elsewhere for their own purposes, was held unable to recover from the company because the two men were not in a legal sense its servants or employees when their negligent acts were committed. *Langley v. Boston Elevated Railway*, 492.

In Sale of Food.

If a dealer in meat undertakes to make a selection of pork chops to fill an order given to him by a woman on behalf of her husband, and selects unwholesome meat, the eating of which makes the woman sick, such selection is not, without more, negligence as a matter of law which would make the dealer liable in an action of tort brought against him by the woman for personal injuries so received and alleged to have been caused by his negligence. *Gearing v. Berkson*, 257.

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Ibid.*

Under such circumstances, neither spouse has a right to recover for the loss of consortium. *Ibid.*

In Emergency.

Certain facts were held not to call for an application of the rule permitting a finding of due care on the part of one, who, suddenly and without fault on his part finding himself in a position of impending and unexpected danger, became confused, because the decedent's own carelessness placed him in such a position. *Fogg v. New York, New Haven, & Hartford Railroad*, 444.

Negligence (continued).

Causing Mental Suffering.

Upon the facts in evidence at the trial of an action by a woman for personal injuries, it was held to have been proper for the presiding judge to refuse to give an instruction to the jury as to it not being the duty of the defendant to anticipate an injurious result which would happen only to a person of peculiar sensitiveness, irrespective of the question whether the ruling requested would be a correct one if it were applicable to the facts of the case, because the instruction was inapplicable. *McCarthy v. Boston Elevated Railway*, 568. On evidence at the trial of the above action as to hysteria suffered by the plaintiff it was held that there was evidence warranting a finding that the plaintiff was injured permanently. *Ibid.*

Toward One engaged in Common Enterprise.

In an action by a district nurse against a physician for personal injuries received while in the defendant's automobile and caused by its negligent operation, it was held that it could not be ruled as matter of law that the relation of the plaintiff and the defendant at the time of such injuries was that of persons engaged in a common enterprise. *Loftus v. Pelletier*, 63. Whether in the case above stated it could have been found that the plaintiff and the defendant were engaged in a common enterprise, or whether, if they were, neither of them could sue the other, here were referred to as questions which it was not necessary to consider. *Ibid.*

Gross.

Under the circumstances it was held to have been improper for the judge presiding at the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a highway between a train of the defendant and an automobile driven by the plaintiff, to read to the jury in his charge certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. *Rothwell v. New York, New Haven, & Hartford Railroad*, 550.

Wilful or Reckless Misconduct.

In an action by a tailor against a shipowner for injuries received when the plaintiff, while on the main deck of the vessel as a licensee, was struck by a roll of canvas, it is evidence of wilful, wanton or reckless conduct on the part of the servants of the defendant, that the roll of canvas was thrown deliberately over the rail from the upper or boat deck without the slightest consideration for the safety of whomsoever might be in the path of the canvas as it descended. *Freeman v. United Fruit Co.* 300.

At the trial of such action, it was proper for the defendant to ask one of the witnesses, who was a sailor on board the vessel, "whether or not a parcel of canvas one and a half feet thick" and from twelve to fourteen feet long, as described by the witness, "could have been conveniently carried down the stairways," this having some bearing on the question of recklessness. *Ibid.* In the same action it was held that the plaintiff properly could put in evidence

the orders given by the boatswain, in reply to an inquiry by one of the sailors whether the canvas was to be carried down or dropped down, "Throw it down; take a chance and throw it down." *Freeman v. United Fruit Co.* 300.

Provisions of a pass in writing accepted and used by a person on a vessel lying in dock were held to prevent him from maintaining an action against the owner of the vessel for injuries caused by a heavy roll of canvas being recklessly thrown down upon him by the owner's servant when he was on the main deck. *Ibid.*

Causing Death.

In an action by an administrator against a gas company under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for negligently causing the death of the plaintiff's intestate by permitting gas to enter the pipes in a tenement, it was held that the evidence disclosed no circumstances from which it could be inferred that the intestate was actively in the exercise of due care as required by the statute. *Ashton v. Fall River Gas Works Co.* 20.

A person, who, while standing upon a portion of the premises of a railroad corporation separated from a station without an express or implied invitation by the corporation, waiting for a train and not looking nor listening for a train, was struck and killed by a train, was not in the exercise of due care and, since he was not a passenger, no action for causing his death could be maintained under St. 1906, c. 463, Part I, § 63. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.

It was held that, at the trial of an action by an administrator for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by his having been run over at a street crossing on an afternoon late in November by an ice wagon negligently driven by an employee of the defendant, there was evidence of negligence of the driver and of the due care of the plaintiff's intestate required by R. L. c. 171, § 2, as amended by St. 1907, c. 375. *Walker v. Gage*, 179.

Administrator of the estate of a woman running or walking rapidly diagonally across a street in front of a street car ten feet away from her was held not to be able to maintain an action against the street railway corporation under St. 1906, c. 463, as amended by St. 1907, c. 392, for negligently causing her death, there being no evidence that she was in the active exercise of reasonable care for her safety. *Welsh v. Concord, Maynard & Hudson Street Railway*, 184.

Lord Campbell's act, St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence, is remedial and not penal. *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

Although St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence and requiring that such action shall be brought in the name of the executor or administrator of the person deceased but for the benefit of the wife, husband, parent and child of such person, vests no right of property in the deceased which survives to his personal representative, such an action under that foreign statute may be brought in this Commonwealth against a corporation having a usual place of business here by an administrator appointed here of the estate of a person whose death was caused in English waters by the negligence of the defendant. *Ibid.*

An executor or administrator appointed in this Commonwealth may bring in

Negligence (*continued*).

the courts of this Commonwealth an action for the negligent causing in another State or country of the death of his testator or intestate if a remedial statute of such State or country gives to an executor or administrator the right to recover damages "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused." *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

Evidence at the trial of an action against a railroad company under St. 1907, c. 392, § 1, for the death of one who was run into by a train at a grade crossing was held not to warrant a finding that the decedent was in the active exercise of care for his safety. *Fogg v. New York, New Haven, & Hartford Railroad*, 444.

It also was held that the foregoing facts do not call for an application of the rule permitting a finding of due care on the part of one, who, suddenly and without fault on his part finding himself in a position of impending and unexpected danger, becomes confused, because the decedent's own carelessness placed him in such a position. *Ibid.*

As to the decedent's wife, who was with him in the automobile and also was killed, it was held that, if she was trusting to the care and caution of her husband, there could be no recovery for her death because he was negligent, and, if she was not so trusting, there could be no recovery because there was no evidence that she did anything for her own safety. *Ibid.*

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

In an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube it was held that the cause of the explosion was not left to conjecture, and that the question of the defendant's liability was for the jury. *Ibid.*

At such trial, the fact that the explosion occurred while the boiler was being subjected to the use for which it was designed was held to be in itself evidence of a defective condition. *Ibid.*

It also was held that, while the plaintiff was bound to offer evidence to show that the explosion was caused by negligence of the defendant, he was not required to point out the particular act or omission which caused the accident. *Ibid.*

Overflow of Surface Drainage System.

Responsibility for damage caused by the overflowing of systems of surface drainage in towns. *Dupuis v. Fall River*, 73; *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

Violation of Municipal Ordinance.

Whether the conduct of the plaintiff, in an action against one operating an automobile by a boy who while rolling a hoop on the highway was run into by the automobile, was a violation of an ordinance of the city, was held to be a question for the jury, so that it could not be ruled as a matter of law that the duty only owed to the plaintiff by the defendant was to refrain from wanton and reckless misconduct. *Patrick v. Deziel*, 505.

Res ipsa loquitur.

In an action against a street railway corporation for personal injuries sustained when the plaintiff was a passenger in a car of the defendant by reason of the heel of her boot catching between the iron guides on the threshold, where the car was a new one and the plaintiff did not contend that it was in any way out of order, the mere happening of the accident is no evidence in itself of negligence on the part of the defendant. *Perkins v. Bay State Street Railway*, 235.

The unexplained fall of an ordinary dumb-waiter, which is operated by two ropes, connected with an apartment occupied by a tenant for whose purposes it is used exclusively, is no evidence of a defect in the condition of the dumb-waiter or of negligence in maintaining it. *Green v. Hammond*, 318.

At the trial of an action to recover for the death of an employee upon a steamship caused by the explosion of a boiler tube, the fact that the explosion occurred while the boiler was being subjected to the use for which it was designed was held to be in itself evidence of a defective condition. *Souden v. Fore River Ship Building Co.* 509.

It also was held that, while the plaintiff was bound to offer evidence to show that the explosion was caused by negligence of the defendant, he was not required to point out the particular act or omission which caused the accident. *Ibid.*

Proximate Cause.

It was held that, at the trial of an action against a corporation operating a street railway in Boston for personal injuries sustained by reason of the plaintiff being thrown to the ground from the seat of a wagon from which he was driving four horses and was proceeding from a private way into Commercial Street when the wagon was struck by a car of the defendant, if the jury should find that a certain street regulation was violated by the plaintiff, it then would be a question of fact whether such violation was a proximate cause of the plaintiff's injury. *Driscoll v. Boston Elevated Railway*, 533.

Only one Action for Damages.

All damages resulting to a person from personal injuries due to the negligence of another person should be recovered in one action. Two separate actions cannot be maintained by the same plaintiff, one for suffering and another for expenses incurred for medicine, nursing, care, and medical and surgical attendance caused by the same injury. *Cole v. Bay State Street Railway*, 442.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOLO CONTENDERE.

See appropriate subtitle under PRACTICE, CRIMINAL.

Non-support.

NON-SUPPORT.

It is no defence to a complaint under St. 1911, c. 456, § 1, for refusing to provide for the support and maintenance of the complainant as the defendant's wife, that the defendant was induced to marry the complainant by her false representations that she was chaste. *Commonwealth v. Shaman*, 62.

Complaint under St. 1913, c. 563, § 7, against the father of an illegitimate child for neglecting to contribute reasonably to the child's support. *Commonwealth v. Callaghan*, 150.

NOTICE.

Requirements as to notice of a sale in foreclosure of a mortgage of real estate. *Taylor v. Weingartner*, 243.

As to necessary proof of notice in an action under R. L. c. 51, §§ 20-22, as amended by St. 1908, c. 305, and St. 1913, c. 324. *Sweet v. Pecker*, 286.

Of defect in highway, see appropriate subtitle under WAY, Public.

Under WORKMEN'S COMPENSATION ACT, see appropriate subtitle thereunder.

NUISANCE.

In a suit in equity against a manufacturer of mattresses to restrain him from maintaining an alleged nuisance in the operation of his factory to the alleged injury of the plaintiff and his family by noise and the vibration of the plaintiff's dwelling house, it was held that a finding of a master, that the defendant was committing no nuisance in the operation of the machinery of his factory and that the plaintiff was not entitled to relief, could not be said as matter of law to be wrong. *Cremidas v. Fenton*, 249.

NURSE.

Where in an action by a district nurse against a physician for personal injuries received while in the defendant's automobile, it appeared that the plaintiff was hired and paid by a local organization to attend patients who could not afford a nurse, when called upon to do so by the doctor in charge of such a patient, and that it was her duty to go with a doctor in his automobile at his request to attend a patient and that she was injured during such a transportation, it was a question for the jury whether the plaintiff was being carried by the defendant for hire under her contract of employment. *Loftus v. Pelletier*, 63.

In the case above stated it also was held that it could not be ruled as matter of law that the relation of the plaintiff and the defendant at the time of such injuries was that of persons engaged in a common enterprise. *Ibid*.

Whether in the case above stated it could have been found that the plaintiff and the defendant were engaged in a common enterprise, or whether, if they were, neither of them could sue the other, here were referred to as questions which it was not necessary to consider. *Ibid*.

PARENT AND CHILD.

It is not a defence to a complaint under St. 1913, c. 563, § 7, against the father of an illegitimate child for neglecting and refusing to contribute reasonably

to the support of such child, that after the birth of the child the mother married another man who provides for the child's support. *Commonwealth v. Callaghan*, 150.

Such statute is not an *ex post facto* law and is constitutional. *Ibid.*

Upon a complaint under such statute which incorporates by reference the provision as to practice contained in St. 1911, c. 456, § 7, that, "proof . . . of the neglect or refusal . . . shall be *prima facie* evidence that such . . . neglect or refusal is wilful and without just cause," the jury can find the defendant guilty although no demand was made upon him during the three years preceding the time of the trial. *Ibid.*

PARKS AND PARKWAYS.

The facts that the park commissioners of a city, acting under proper authority, "set out with shrubbery and laid out in grass" an area adjoining a highway and constructed round it a brick walk with a curbing, a part of which was within the limits of the highway, do not deprive of its character the part of the highway occupied by the brick walk and its curbing, and the city is liable to a traveller who sustains an injury from a defect in the curbing of this part of the brick walk of which the city had notice. *Eklon v. Chelsea*, 213.

PARTNERSHIP.

The relations of partners as between themselves are not changed by the adoption of the instrumentality and name of a corporation in carrying on their business. *Arnold v. Maxwell*, 47.

It is the duty of a partner to disclose to his copartner any bargains affecting their joint interest entered into by him with third parties for his own benefit and all matters of business within the scope of the partnership agreement of which his copartner is ignorant and has not the means of information. *Ibid.*

Where four years after a settlement between two partners, one a business man who had had "charge of the business management" and the other a lawyer who had agreed to "manage the legal end of the enterprise and advise with" his partner, the business man for the first time learned that the lawyer had "purposely refrained" from bringing to the business partner's attention certain matters affecting their joint interest but benefiting the lawyer, it was held that the business partner might maintain a bill in equity against the lawyer partner for an accounting. *Ibid.*

In such suit in equity, where it appeared that the parties could not be restored to the position they were in when the settlement was made, it was held that the defendant was chargeable in a partnership accounting on the basis of the agreement of equality as of the date of the settlement. *Ibid.*

In determining whether a bankrupt was insolvent at the time of making an alleged unlawful preference, it is right in computing the bankrupt's assets and liabilities to add to the personal debts of the bankrupt the debts of a partnership of which he was a member and for the debts of which he was liable jointly with a partner besides individually, because he had agreed to pay the debts of the partnership on its dissolution. *Rubenstein v. Lottow*, 227.

In a suit in equity for an accounting between the plaintiff and the defendant for carrying on as copartners a cigar, tobacco and confectionery business it was

Partnership (*continued*).

held, that under the circumstances the plaintiff was entitled to share in the net value at the time of the termination of the partnership of a lease obtained by the defendant from a city and claimed by the defendant as his sole property in excess of the rent reserved. *Deutschman v. Dwyer*, 261.

PASSENGER.

No contract giving rise to the relation of carrier and passenger will be implied on the part of a railroad corporation from mere passive acquiescence on its part in a customary use, by persons intending to board its trains as passengers when the trains stopped at a certain station, of a portion of its premises near a track but separated from the station by two tracks and an open girder bridge. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.

Consequently there can be no recovery under St. 1906, c. 463, Part I, § 63, for causing the death of a person who, while standing at such place, was killed by a passing train, unless such person is shown to have been in the exercise of due care. *Ibid*.

Actions for personal injuries suffered by passengers, see appropriate subtitles under CARRIER and NEGLIGENCE.

PERPETUITIES, RULE AGAINST.

Certain pledge agreement by managers of a syndicate was held not to be in violation of the rule against perpetuities. *Minot v. Burroughs*, 595.

PHOTOGRAPH.

Use in evidence, see appropriate subtitle under EVIDENCE.

PHYSICIANS AND SURGEONS.

Where, in an action by a district nurse against a physician for personal injuries received while in the defendant's automobile, it appeared that the plaintiff was hired and paid by a local organization to attend patients who could not afford a nurse, when called upon to do so by the doctor in charge of such a patient, and that it was her duty to go with a doctor in his automobile at his request to attend a patient and that she was injured during such a transportation, it was a question for the jury whether the plaintiff was being carried by the defendant for hire under her contract of employment. *Loftus v. Pelletier*, 63.

In the case above stated it also was held that it could not be ruled as matter of law that the relation of the plaintiff and the defendant at the time of such injuries was that of persons engaged in a common enterprise. *Ibid*.

Whether in the case above stated it could have been found that the plaintiff and the defendant were engaged in a common enterprise, or whether, if they were, neither of them could sue the other, here were referred to as questions which it was not necessary to consider. *Ibid*.

At the trial of complaints under R. L. c. 76, § 8, for practicing medicine without being lawfully authorized and registered, where the defendant assumed to be a clairvoyant and also contended that he merely sold medicines as the

agent of two corporations, instructions to the jury to the effect that under § 9 the defendant lawfully could not prescribe medicine for the cure of disease were held to be correct. *Commonwealth v. Lindsey*, 392.

It also was held to be correct to leave it to the jury to say whether in selling the medicines the defendant was acting entirely as the agent of the corporations or was engaged in the practice of medicine. *Ibid.*

It also was held that at the trial of the same complaints the Commonwealth, for the purpose of showing the defendant's intent by his behavior in the course of his business, may introduce evidence of sales of medicines by him on days other than the days named in the complaints when his conduct tended to show that he was prescribing the medicines that he sold. *Ibid.*

Under the circumstances it was held that the Industrial Accident Board, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, had no right to approve the bill of an outside physician. *Pecott's Case*, 546.

PLAN.

As evidence, see appropriate subtitle under EVIDENCE.

In a suit in equity to enforce an alleged equitable restriction requiring a set back from two streets, it was held that, in determining what was the restriction upon the defendant's land, the language of the deed to the defendant's predecessor in title from the common grantor of the plaintiff and the defendant and a plan with lines, some named and some not, must be considered together, and that the defendant was bound by a line on the plan which was not named but which was held to require a set back of fifteen feet. *Oliver v. Kalick*, 252.

PLEADING, CIVIL.

Declaration.

Demurrer to a declaration in an action of contract by a mortgagee of personal property against an insurance company upon a policy of fire insurance payable in case of loss to another person and the plaintiff as their interest might appear, was sustained because there was no allegation to indicate what interest, if any, the other payee had in the proceeds due under the policy and no allegation of the total value of the goods covered by the policy that had been destroyed or damaged. *Frisbee v. Prussian National Ins. Co.* 159.

In an action against a corporation operating street and elevated railways for personal injuries sustained by reason of an accident, which caused mental suffering as well as some physical injury, a general averment of damages in the declaration is sufficient to cover the proof of physical and mental suffering of the plaintiff based upon permanent injury, a claim for permanent injury not being a matter of special damage. *McCarthy v. Boston Elevated Railway*, 568.

Demurrer.

Under R. L. c. 173, § 16, cl. 2, an averment in the causes assigned for a demurrer, that the declaration does not state a legal cause of action substantially in accordance with the rules contained in R. L. c. 173, is sufficient as a general demurrer. *Frisbee v. Prussian National Ins. Co.* 159.

Answer.

In an action of contract, the defendant in which filed a petition in bankruptcy while the action was pending and obtained a discharge, but, although a suggestion of bankruptcy was filed, the defendant filed no answer setting up his discharge in bankruptcy as a bar to the plaintiff's claim, it was assumed in the record before this court and in the briefs of the counsel on both sides that the discharge had the same effect that it would have had if duly pleaded, and the case was so treated by this court. *Fingold v. Schacter*, 274.

In an action of tort by an employee against his employer for personal injuries, the defence that there was a contractual assumption of the risk of the injury may be relied on without being set up affirmatively in the answer. *Cuozzo v. Clyde Steamship Co.* 521.

Amendment.

See appropriate subtitle under PRACTICE, CIVIL.

PLEDGE.

Pledge by syndicate managers of unissued shares to trustees holding the syndicate's real estate was held under the circumstances to be valid. *Minot v. Burroughs*, 595.

PLUMBER.

It is the duty of a plumber, whom the owner of a house has employed to install a hot water boiler in his basement to be supplied by a hot water coil in a heater which is a part of a hot water heating system, and to whom the owner has left entirely the plan and execution of the work, to perform the work in a workmanlike manner and with reasonable judgment, skill and care according to the approved usages of his trade. *Kelley v. Laraway*, 182.

POWER.

Validity of a power reserved to himself by a settlor of a trust created by deed for the maintenance and support of his wife and children, "in and by his last will and testament to debar and prohibit either of his said children from any share or part of said trust property, the income, profits and accumulations thereof anything herein to the contrary notwithstanding." *Watson v. Watson*, 425.

Proper exercise of such power. *Ibid.*

Result of a revocation under such power was held to be that the trust could not be terminated until the death of the last survivor of the settlor's children and that in the meantime no child could receive any part of the principal. *Ibid.*

In further construction of the same trust deed, it was held that the settlor had the power, which he had exercised properly by his will, to direct that \$5,000 should be paid from the income of the trust to each of his sons, and that the right of the other children to share in the income was postponed until the two payments of \$5,000 each had been made from the net income accumulated for the purpose. *Ibid.*

And it also was held that a discretionary power given by the deed of trust to the trustees, to apply any part of the principal for the benefit of the children when in their judgment it became necessary, was revoked. *Ibid.*

PRACTICE, CIVIL.

Venue.

See that title.

Parties.

A judge presiding at a trial of an action of contract upon an account annexed for work, labor and materials has power during the trial to allow an amendment adding as a party plaintiff one who, according to the testimony of the original plaintiff on cross-examination, was a partner at the time of the incurring of the debt for the recovery of which the action is brought; and it is not necessary that the trial should be stopped or that the plaintiff should become nonsuit. *Richardson v. Bartlett*, 450.

Amendment.

The provisions of R. L. c. 173, § 52, empowering the Supreme Judicial Court or the Superior Court to allow amendments changing a suit in equity into an action at law or an action at law into a suit in equity "upon terms," do not require that, in granting such a motion, costs shall be imposed upon the moving party. *Lewenstein v. Forman*, 325.

The imposition of costs in such cases still is left, under R. L. c. 203, § 14, and Equity Rules 12 and 21, within the discretion of the court and such an amendment may be allowed without costs. *Ibid.*

A judge presiding at a trial of an action of contract upon an account annexed for work, labor and materials has power during the trial to allow an amendment adding as a party plaintiff one who, according to the testimony of the original plaintiff on cross-examination, was a partner at the time of the incurring of the debt for the recovery of which the action is brought; and it is not necessary that the trial should be stopped or that the plaintiff should become nonsuit. *Richardson v. Bartlett*, 450.

Upon a petition to establish exceptions, which comes before this court upon the report of a commissioner, it is not appropriate to make a motion under St. 1913, c. 716, § 3, for an amendment of the record in this court, because the only exceptions that can be established and considered are those that the trial judge refused to allow. *Freedman v. Lipman*, 471.

Where, on a petition, filed under R. L. c. 193, §§ 15-17, to vacate a judgment in the sum of over \$15,000, a judge of the Superior Court erroneously issued an order that notice issue and that, upon the filing of a bond for \$5,000, a writ staying execution should issue, it was held that he might correct the error before he ordered that the judgment be vacated and that a writ of supersedeas should issue, because the hearing upon the petition was still open. *Hunt v. Simester*, 489.

Plaintiff, who was held unable to maintain an action of contract, was given permission by this court to amend his action of contract into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

Nonsuit.

A judge presiding at a trial of an action of contract upon an account annexed for work, labor and materials has power during the trial to allow an amend-

Practice, Civil (*continued*).

ment adding as a party plaintiff one who, according to the testimony of the original plaintiff on cross-examination, was a partner at the time of the incurring of the debt for the recovery of which the action is brought; and it is not necessary that the trial should be stopped or that the plaintiff should become nonsuit. *Richardson v. Bartlett*, 450.

Interpleader.

The provisions of R. L. c. 173, § 37, authorizing an interpleader in an action at law, do not alter the settled doctrines applicable to bills of interpleader in equity. *Gonia v. O'Brien*, 177.

Such statute does not give a defendant a right as a matter of law to have a petition granted to have one whom he alleged was the plaintiff's principal compelled to interplead, where such petition is not filed until after a verdict has been rendered for the plaintiff upon issues including those raised by the petition. *Ibid.*

Nor does the statute give to a claimant a right as a matter of law to intervene in such an action after a verdict for the plaintiff. *Ibid.*

Rules of Court.

Rule 35 of the Superior Court. *Lynch v. C. J. Larises Lumber Co.* 335.

Rule 36 of the Superior Court. *Ibid.*

Actions tried together.

Where, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases without objection by the plaintiff offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites the facts tending to show negligence of the other defendant, and the presiding judge instructs the jury that the statement was not evidence against the other defendant and must be disregarded as to him, an exception by the other defendant must be overruled. *Kennedy v. Armstrong*, 354.

Where an action for breach of a certain contract in writing and a cross action by the defendant in the first action against the plaintiff in that action alleging a breach of the same contract were tried together and exceptions of the plaintiff in the first action to the rulings of the judge in that action were sustained by this court but for some unexplained reason no exception appeared to have been taken to an ordering of a verdict in the cross action, it was held, that under the circumstances in spite of this defect in procedure a new trial must be ordered in both actions. *Federal Coal & Coke Co. v. Coryell*, 430.

Interrogatories.

In an action against a corporation for personal injuries, the plaintiff in his cross-examination of a witness for the defendant may make use of the substance of

an answer to one of the interrogatories propounded by the plaintiff to the defendant's president. *Freeman v. United Fruit Co.* 300.

And, if the defendant does not choose to put in evidence the interrogatory and the entire answer to it or all the interrogatories and answers relating to that subject, this does not deprive the plaintiff's counsel of the right afterwards to refer to the substance of the answer in his closing argument to the jury. *Ibid.*

Trial by Jury.

In an action at law, where the defendant had claimed a jury trial and, when the case came on for trial, waived the claim and moved to have the case taken from the jury list, whereupon the plaintiff moved orally for a trial by jury, and where the presiding judge denied the defendant's motion and ordered that the trial proceed before a jury, it was held that the error of the judge in denying the defendant's motion did the defendant no harm and would not support an exception, because the plaintiff had a right to move orally for a trial by jury and the judge had power to grant that motion as he did. *Gouzoulas v. F. W. Stock & Sons*, 537.

In an action by a creditor on the bond of an administrator, it was held on the allegations of the declaration that it was right for the trial judge to refuse a request of the defendant, opposed by the plaintiff, to order the removal of the case to the jury waived list, the issues being questions of fact for a jury. *McIntire v. Conlan*, 389.

View.

It long has been settled in this Commonwealth that a presiding judge in a case where the jury have taken a view may none the less on that account rule upon the effect of the evidence and order a verdict. *Albright v. Sherer*, 39.

Where the bill of exceptions in an action of tort stated that the jury took a view of a wagon, alleged by the plaintiff to be defective, and that the bill contained "all the material evidence in the case," it was held that an assumption that other defects than one which the jury found was not the cause of the accident were disclosed by the view could not be made by way of conjecture in favor of the excepting party, who had failed to show that he was prejudiced by action of the judge in ordering the verdict. *Ibid.*

Finding by Trial Judge.

In a finding by a trial judge that the libellant in a suit for divorce "lived there [in Springfield] during a part of the summer and fall of 1912" and a further finding that the domicile of the libellant at that time was in Westport, the word "lived" is used in the sense of subsisted and does not relate to legal residence. *Sampson v. Sampson*, 451.

Ordering of Verdict.

It long has been settled in this Commonwealth that a presiding judge in a case where the jury have taken a view may none the less on that account rule upon the effect of the evidence and order a verdict. *Albright v. Sherer*, 39.

Practice, Civil (*continued*).

In an action by an administrator against a corporation for personal injuries, if the defendant introduces a release of the cause of action executed by the intestate, and the plaintiff admits its execution, merely denying that the words "I have read the above and agree to it" were written by the intestate, and if there is no evidence of illiteracy, mental incompetency, fraud, misrepresentation or coercion, a verdict must be ordered for the defendant. *La Croix v. Boston Elevated Railway*, 242.

Where, at the trial of an action upon the probate bond of an administrator by a creditor of the estate of the intestate, the principal defendant admits that the plaintiff brought an action against him as administrator and recovered judgment for the debt and that the defendant failed to expose goods or estate to be taken in satisfaction thereof, and where it is not disputed that the amount of the judgment debt is larger than the penal sum of the bond with interest from the date of the writ, the trial judge in his discretion properly may order a verdict for the plaintiff in the penal sum of the bond with interest thereon from the date of the writ. *McIntire v. Conlan*, 389.

Conduct of Trial.

Reference of counsel to insurance company as real party defendant.

Refusal by a judge, who presided at the trial together of two actions of tort by the same plaintiff against different defendants for personal injuries resulting from a collision of automobiles, to stop the trial and to take one of the cases from the jury merely because of a suggestion by the plaintiff's counsel in cross-examination of a medical expert called by the defendant in that case, [that the defendant was insured and that the defendant in interest was an insurance company, was held under the circumstances not to be an abuse of judicial discretion. *Kennedy v. Armstrong*, 354.

Use of deposition by adverse party.

Where, after the plaintiff has rested at the trial of an action at common law, the defendant also rests without having introduced any evidence and without offering in evidence a deposition of a witness, which had been taken at his request and by consent of parties under Rule 35 of the Superior Court two days before the trial of the action, copies having been submitted to the counsel for both parties but the original not having been filed with the clerk of the court as required by Rule 36, it is proper for the presiding judge to refuse to permit the plaintiff to introduce the deposition in evidence. *Lynch v. C. J. Larivee Lumber Co.* 335.

Order of proof.

The determination of the order of proof at a trial is within the discretion of the trial judge. *Lowell Trust Co. v. Wolff*, 168.

Discretion as to stopping trial.

Refusal by a judge, who presided at the trial together of two actions of tort by the same plaintiff against different defendants for personal injuries resulting from a collision of automobiles, to stop the trial and to take one of the cases from the jury merely because of a suggestion by the plaintiff's counsel in cross-examination of a medical expert called by the defendant in that case, that the defendant was insured and that the defendant in interest

was an insurance company, was held under the circumstances not to be an abuse of judicial discretion. *Kennedy v. Armstrong*, 354.

Argument to jury.

A certain comment in an argument to a jury upon an answer to an interrogatory which was not formally put in evidence was held to have been proper. *Freeman v. United Fruit Co.* 300.

Instructions to disregard evidence.

Where, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases without objection by the plaintiff offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites the facts tending to show negligence of the other defendant, and the presiding judge instructs the jury that the statement was not evidence against the other defendant and must be disregarded as to him, an exception by the other defendant must be overruled. *Kennedy v. Armstrong*, 354.

No exception lies to the admission of evidence which the presiding judge afterwards during the trial orders stricken from the case. *Ibid.*

Requests, rulings and instructions.

It long has been settled in this Commonwealth that a presiding judge in a case where the jury have taken a view may none the less on that account rule upon the effect of the evidence and order a verdict. *Albright v. Sherer*, 39.

Where, at a trial before a jury, the law of another State is an issue and a part of the evidence introduced upon the subject consists of a report of a decision of the highest law court of such State, it is improper for the presiding judge to instruct the jury as to what is the rule of law established by that decision. *Paddleford v. Lane & Co. Inc.* 113.

A judge of the Municipal Court of the City of Boston, at the trial before him of an action of contract, rightly may refuse to make a ruling that "Upon all the evidence the finding should be for the defendant," if there is evidence on which he can and does find for the plaintiff. *Wyche v. Uebelhoefer*, 353.

In an action against a contractor constructing a subway for personal injuries caused by the presence of an unguarded plank, it was held to have been misleading error for the presiding judge to instruct the jury that, "if the plaintiff has satisfied you that the defendant placed there on the sidewalk something that was likely to have caused injury, that was a nuisance," and that "the defendant had no right to place an obstruction there." *Murphy v. Hugh Nawn Contracting Co.* 404.

An exception will not be sustained to the refusal of a presiding judge to make a ruling which he covered fully in substance in the instructions given. *Coles v. Boston & Maine Railroad*, 408.

A judge properly may refuse to make a ruling which states correctly a principle of law if the condition of the case does not require the application of the principle. *Ibid.*

Where, at a fourth trial of an action a witness who formerly had been an employee of the defendant was not called to testify and there was no evidence that he was in the control either of the plaintiff or of the defendant, it was held that the judge erred in leaving to the jury the question, whether any

Practice, Civil (*continued*).

inference should be drawn against the defendant from the absence of the witness, and that he should have ruled that no inference could be drawn against either the plaintiff or the defendant from the failure to produce the witness. *Fitzpatrick v. Boston Elevated Railway*, 475.

Under the circumstances it was held to have been improper for the judge presiding at the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a highway between a train of the defendant and an automobile driven by the plaintiff, to read to the jury in his charge certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. *Rothwell v. New York, New Haven, & Hartford Railroad*, 550.

Upon the facts in evidence at the trial of an action by a woman for personal injuries, it was held to have been proper for the presiding judge to refuse to give an instruction to the jury as to it not being the duty of the defendant to anticipate an injurious result which would happen only to a person of peculiar sensitiveness, irrespective of the question whether the ruling requested would be a correct one if it were applicable to the facts of the case, because the instruction was inapplicable. *McCarthy v. Boston Elevated Railway*, 568.

Judge's charge.

It was held to have been error for the judge presiding at the trial of an action against a religious corporation, calling itself Roman Catholic and seeking to be accepted by the Roman Catholic Church but not so accepted, to recover compensation for services performed as a priest, where there had been no evidence in regard to the polity or laws governing the Roman Catholic Church, to make certain comments upon such polity in the charge to the jury. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

Where, at a trial before a jury, the law of another State is an issue and a part of the evidence introduced upon the subject consists of a report of a decision of the highest law court of such State, it is improper for the presiding judge in his charge to instruct the jury as to what is the rule of law established by that decision. *Paddleford v. Lane & Co. Inc.* 113.

On the evidence at the trial of an action of contract, made by correspondence, for the purchase price of cabbages, it was held that the judge made a material error in his charge in describing the contract as one for a sale of "Danish cabbage," because the contract was for a sale of "fine stock" cabbages and came within the rules of law applicable to contracts for the sale of goods of "specific quality." *Ibid.*

Where at the same trial there is evidence that a condition of the sale was that the defendant should have a right to inspect the cabbages after their arrival before he should become liable for the purchase price, and the method of shipment adopted gave the defendant no such right to inspect until the defendant had paid a draft drawn upon him for the purchase price, it is improper for the presiding judge in his charge to make justification for a refusal by the defendant to accept the cabbages conditional upon the defendant having seasonably asked the plaintiff for permission to inspect. *Ibid.*

Under the circumstances it was held to have been improper for the judge presiding at the trial of an action under St. 1906, c. 463, Part II, § 245, for personal injuries caused by a collision at a grade crossing of a railroad with a

highway between a train of the defendant and an automobile driven by the plaintiff, to read to the jury in his charge certain passages from the opinion of the court in *Chase v. New York Central & Hudson River Railroad*, 208 Mass. 137, 145, 146, which the defendant had asked him to give as instructions to the jury. *Rothwell v. New York, New Haven, & Hartford Railroad*, 550.

New Trial.

New trial in an action of tort was ordered limited to the issue of damages.

Stevens v. Stewart-Warner Speedometer Corp. 44.

Where an action for breach of a certain contract in writing and a cross action by the defendant in the first action against the plaintiff in that action alleging a breach of the same contract were tried together and exceptions of the plaintiff in the first action to the rulings of the judge in that action were sustained by this court but for some unexplained reason no exception appeared to have been taken to an ordering of a verdict in the cross action, it was held that under the circumstances in spite of this defect in procedure a new trial must be ordered in both actions. *Federal Coal & Coke Co. v. Coryell*, 430.

Exceptions.

Petition to establish.

Upon a petition to establish exceptions, which comes before this court upon the report of a commissioner, it is not appropriate to make a motion under St. 1913, c. 716, § 3, for an amendment of the record in this court, because the only exceptions that can be established and considered are those that the trial judge refused to allow. *Freedman v. Lipman*, 471.

Burden of proof of prejudicial error.

Where a party to an action has excepted to the admission of certain evidence, otherwise competent, on the ground that it tends to create a prejudice against him on a collateral issue, the burden is upon him to disclose in his bill of exceptions sufficient evidence to show that the evidence objected to by him was introduced in such a way or at such a time as to demonstrate its purpose to arouse prejudice. *Godfrey v. Old Colony Street Railway*, 419.

Construction.

Where the bill of exceptions in an action of tort stated that the jury took a view of a wagon, alleged by the plaintiff to be defective, and that the bill contained "all the material evidence in the case," it was held that an assumption that other defects than one which the jury found was not the cause of the accident were disclosed by the view could not be made by way of conjecture in favor of an excepting party, who had failed to show that he was prejudiced by action of the judge in ordering the verdict. *Albright v. Sherer*, 39.

Insufficient bill.

Where upon a petition to establish exceptions it had been asked improperly that a copy of the charge of the trial judge might be annexed to the record, it was said, that an examination of the copy of the charge presented for annexation disclosed no error, for the reason that the evidence was not set forth with sufficient fullness to show that the charge was not apt and complete. *Freedman v. Lipman*, 471.

Practice, Civil (continued).

Where a bill of exceptions fails to indicate that there was any evidence to which certain rulings refused by a presiding judge were applicable, the exceptions to the refusal to make the rulings will be overruled without considering whether they are sound in law or not. *Freedman v. Lipman*, 471.

Where upon a bill of exceptions it appears that certain evidence, to the admission of which an exception was taken, might conceivably have been competent in some aspects of the trial and the record is so meagre that it cannot be said that the admission of the evidence adversely affected the substantial rights of the excepting party, the exception will be overruled. *Ibid.*

Scope of exceptions.

Where an action for breach of a certain contract in writing and a cross action by the defendant in the first action against the plaintiff in that action alleging a breach of the same contract were tried together and exceptions of the plaintiff in the first action to the rulings of the judge in that action were sustained by this court but for some unexplained reason no exception appeared to have been taken to an ordering of a verdict in the cross action, it was held that under the circumstances in spite of this defect in procedure a new trial must be ordered in both actions. *Federal Coal & Coke Co. v. Coryell*, 430.

Although in a case in the Land Court, where a trial by jury is not claimed, the findings of a judge of that court upon all questions of fact are final, yet, where the facts on which the finding was made are not in dispute and all the evidence is before this court, the question of law is presented whether the evidence justified the finding of the judge. *Hart v. Rueter*, 207.

Upon the hearing of exceptions by the defendant in an action against a corporation operating a street railway for personal injuries alleged to have been caused by running down the plaintiff with a car of the defendant, the defendant's counsel in his brief suggested for the first time that there was no evidence that the defendant was operating the street railway on which the plaintiff was injured, but because upon plans put in evidence by the defendant the railway track was designated as the track of the defendant, it was held that, in the absence of any evidence to the contrary, this warranted a finding that the car which struck the plaintiff was operated by the defendant. *Brereton v. Milford & Uzbridge Street Railway*, 130.

Whether excepting party was harmed.

No exception lies to the admission of evidence which the presiding judge afterwards during the trial orders stricken from the case. *Kennedy v. Armstrong*, 354.

Where, at the trial together of two actions by the same plaintiff for personal injuries received in a collision of two automobiles, owned, respectively, by the defendants in the two cases, the defendant in one of the cases without objection by the plaintiff offers in evidence as against the plaintiff a paper purporting to be a copy of a statement made by the driver of the automobile of the defendant offering the paper, which recites the facts tending to show negligence of the other defendant, and the presiding judge instructs the jury that the statement was not evidence against the other defendant and must be disregarded as to him, an exception by the other defendant must be overruled. *Ibid.*

Erroneous admission, by a judge hearing a case without a jury, of testimony of a witness for the plaintiff as to an inventory was held not to be cured by the

fact that there was testimony from another witness tending to show that the defendant admitted that the inventory was correct when it was made, there being nothing to show that this testimony was believed by the judge. *Kaplan v. Gross*, 152.

An exception will not be sustained to the refusal of a presiding judge to make a ruling which he covered fully in substance in the instructions given. *Coles v. Boston & Maine Railroad*, 408.

Exception to a refusal to strike out a witness's answer was overruled, as it did not appear that the defendant was harmed by the answer of the witness, which was of no significance. *Godfrey v. Old Colony Street Railway*, 419.

In the same case an exception to a refusal by the presiding judge to allow the defendant to ask the plaintiff, who was in the employ of a manufacturer, whether after the accident he received a pension from his employer, where the defendant made no offer of proof, was overruled because sufficient facts did not appear on the record to show that the evidence was admissible. *Ibid.*

An exception to the admission of certain evidence here was overruled on the ground that, even if it was incompetent, which did not appear, the substance of it already had been admitted in the examination of a previous witness, so that its introduction could not have harmed the excepting party. *Federal Coal & Coke Co. v. Coryell*, 430.

Where upon a bill of exceptions it appears that certain evidence, to the admission of which an exception was taken, might conceivably have been competent in some aspects of the trial and the record is so meagre that it cannot be said that the admission of the evidence adversely affected the substantial rights of the excepting party, the exception will be overruled. *Freedman v. Lipman*, 471.

In an action at law, where the defendant had claimed a jury trial and, when the case came on for trial, waived the claim and moved to have the case taken from the jury list, whereupon the plaintiff moved orally for a trial by jury, and where the presiding judge denied the defendant's motion and ordered that the trial proceed before a jury, it was held that the error of the judge in denying the defendant's motion did the defendant no harm and would not support an exception, because the plaintiff had a right to move orally for a trial by jury and the judge had power to grant that motion as he did. *Goussoulas v. F. W. Stock & Sons*, 537.

Amendment of bill.

Upon a petition to establish exceptions, which comes before this court upon the report of a commissioner, it is not appropriate to make a motion under St. 1913, c. 716, § 3, for an amendment of the record in this court, because the only exceptions that can be established and considered are those that the trial judge refused to allow. *Freedman v. Lipman*, 471.

Appeal.

While there can be no appeal from a final decree or judgment entered substantially in accordance with a rescript of the full court of the Supreme Judicial Court and such an attempted appeal will be dismissed and the final decree or judgment will stand as if no appeal had been taken, if the form of the final decree or judgment ordered by the rescript is not embodied therein, examination of the subsequent record on appeal will be made in appropriate cases

Practice, Civil (*continued*).

to ascertain whether it is in accordance with the rescript. *Boston, petitioner*, 36.

Costs.

Under the provision of the highway act, contained in the last clause of R. L. c. 48, § 13, one, who opposed before the county commissioners the granting of a petition to lay out a highway across his land, and, after the petition was granted by the county commissioners, filed and successfully maintained a petition for a writ of certiorari to quash the order for the laying out, is not entitled to be indemnified for counsel fees and other expenses and for loss of time incurred in relation to these matters. *Main v. County of Plymouth*, 86.

The provisions of R. L. c. 173, § 52, empowering the Supreme Judicial Court or the Superior Court to allow amendments changing a suit in equity into an action at law or an action at law into a suit in equity "upon terms," do not require that, in granting such a motion, costs shall be imposed upon the moving party. *Lewenstein v. Forman*, 325.

The imposition of costs in such cases still is left, under R. L. c. 203, § 14, and Equity Rules 12 and 21, within the discretion of the court and such an amendment may be allowed without costs. *Ibid.*

Vacation of Judgment.

See JUDGMENT.

Proceedings in Land Court.

Although in a case in the Land Court, where a trial by jury is not claimed, the findings of a judge of that court upon all questions of fact are final, yet, where the facts on which a finding was made are not in dispute and all the evidence is before this court, the question of law is presented whether the evidence justified the finding of the judge. *Hart v. Rueter*, 207.

PRACTICE, CRIMINAL.

Plea of Nolo Contenders.

A record of a conviction following a plea of *nolo contendere* cannot be used in another proceeding to affect the credibility as a witness of the person so convicted. *Olszewski v. Goldberg*, 27.

PROBATE COURT.

Jurisdiction.

Jurisdiction of the Probate Court to grant a decree adjudging one dead who had been absent and had not been heard from for more than seven years and to order distribution by a savings bank of a fund formerly belonging to the estate of his father, which was being administered in that court, and set aside by the court for him. *Jones v. Jones*, 540.

Decree.

Probate Court was held to have jurisdiction to grant a decree adjudging one dead who had been absent and had not been heard from for more than seven years and to order distribution by a savings bank of a fund formerly belonging to the estate of his father, which was being administered in that court, and set aside by the court for him; and therefore, upon the decree being vacated where it appeared twelve years after it was entered that the owner of the fund was not dead, the bank was held to be under no liability because the decree was not void *ab initio*. *Jones v. Jones*, 540.

Appeal.

Upon the hearing of a petition under R. L. c. 162, § 13, relating to the late entry of an appeal from a decree of the Probate Court, it was held that no sufficient excuse for the omission of the steps necessary for taking and perfecting an appeal was shown and that the petition should be dismissed. *Linehan v. Linehan*, 297.

Vacation of Decree.

On a petition to vacate a decree of the Probate Court which had been made more than twelve years before the filing of the petition and which was based on the fact, that the petitioner had died more than seven years before that time and which ordered the distribution of a fund that had been deposited in a savings bank for his benefit, it was held that under the circumstances the decree must be vacated and a decree entered establishing the petitioner's right to the fund but that no liability should be imposed upon the savings bank. *Jones v. Jones*, 540.

PROHIBITION, WRIT OF.

The writ of prohibition is not available for the review and setting right of consummated wrongs but only for the prevention of wrongful acts threatened or justly apprehended. *Smith v. Selectmen of Norwood*, 222.

The function of the writ of prohibition is to restrain judicial or *quasi* judicial tribunals from exceeding their jurisdiction, and it is not available for the purpose of restraining executive, administrative or legislative officers or bodies from acting where they have no authority. *Ibid.*

Where the selectmen and the superintendent of construction of streets of a town merely have given notice to a landowner to remove within thirty days all trees, fences and other property from a certain portion of his land, there is no occasion to grant a petition of the landowner for a writ of prohibition to restrain the assessment of betterments. *Ibid.*

PROXIMATE CAUSE.

Where a compositor in the employ of a newspaper corporation on a hot summer night, following a practice that prevailed among his fellow compositors, descended a fire escape stairway to the roof of an adjoining building belonging to his employer and fell off the roof and was killed, a finding that his death resulted from an injury that arose out of and in the course of his

Proximate Cause (*continued*).

employment within the meaning of St. 1911, c. 751, Part II, §§ 1, 6, was held to have been warranted. *Von Ette's Case*, 56.

Evidence, at the trial of an action by an administrator under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing the death of the plaintiff's intestate, a man sixty-six years of age, was held to warrant a finding that the death was caused by the accident although there was evidence that at the time of the injury he was subject to periodical attacks of gall bladder disease and that the immediate cause of his death was blood poisoning resulting from the condition of the gall bladder. *Walker v. Gage*, 179.

If a workman employed by a subscriber under the workmen's compensation act, who had lost one eye before he entered such employ, is totally incapacitated for work by the loss of his remaining eye from an injury arising out of and in the course of his employment, he is entitled to compensation under the act, although his total incapacity is in part the result of the previous accident by which he lost the first eye. *Branconnier's Case*, 273.

General paralysis and insanity were held to have resulted from an accident to a workman arising out of and in the course of his employment, where the accident aggravated and accelerated syphilis, which before was dormant. *Crowley's Case*, 288.

It was held that at the trial of an action against a corporation operating a street railway in Boston for personal injuries sustained by reason of the plaintiff being thrown to the ground from the seat of a wagon from which he was driving four horses and was proceeding from a private way into Commercial Street when the wagon was struck by a car of the defendant, if the jury should find that a certain street regulation was violated by the plaintiff, it then would be a question of fact whether such violation was a proximate cause of the plaintiff's injury. *Driscoll v. Boston Elevated Railway*, 533.

PUBLIC OFFICER.

The surveyor of highways of a city, who also is its superintendent of streets, in constructing a system of underground drains and catch basins for the purpose of disposing of surface water collecting upon the streets of the city in order to keep such streets reasonably safe and convenient for travel, is a public officer discharging a public duty and is not an agent of the city. *Dupuis v. Fall River*, 73.

Under R. L. c. 25, § 86, a superintendent of streets, appointed by the selectmen of a town which has not authorized the election of road commissioners or a surveyor of highways, is a public officer and is not an agent of the town. *Lead Lined Iron Pipe Co. v. Wakefield*, 485.

On a review of the evidence at the trial of an action of tort by a landowner against a town for injuries caused by the flooding of the plaintiff's land caused by the overflowing, at the time of an unusual rainstorm, of a natural watercourse into which the town had caused surface drainage from streets to be emptied, it was held that, if there were any negligence causing the damage to the plaintiff, it was negligence of the superintendent of streets, who under R. L. c. 25, § 86, was a public officer for whose negligence the town was not liable. *Ibid.*

Evidence that the superintendent of streets worked under the direction of the selectmen was held not to be relevant or material in such an action. *Ibid.*

The Boston Transit Commission, in constructing the Dorchester tunnel under the authority given to them by St. 1911, c. 741, and in making contracts in the name of the city for such construction under § 17 of that statute, are acting as public officers and not as servants or agents of the city. *Murphy v. Hugh Nawn Contracting Co.* 404.

The fact that, if the Boston Transit Commission itself had done certain work in the construction of a subway under the provisions of St. 1911, c. 741, the city of Boston would not have been liable for its negligence because the commissioners were public officers, was held not to free a contractor who did the work from liability in an action by a traveller for personal injuries caused by a defect in a plank substituted by the contractor for the pavement. *Stewart v. Hugh Nawn Contracting Co.* 525.

RAILROAD.

No contract giving rise to the relation of carrier and passenger will be implied on the part of a railroad corporation from mere passive acquiescence on its part in a customary use, by persons intending to board its trains as passengers when the trains stopped at a certain station, of a portion of its premises near a track but separated from the station by two tracks and an open girder bridge. *Youngerman v. New York, New Haven, & Hartford Railroad*, 29.

Consequently there can be no recovery under St. 1906, c. 463, Part I, § 63, for causing the death of a person who, while standing at such place, was killed by a passing train, unless such person is shown to have been in the exercise of due care. *Ibid.*

See also NEGLIGENCE, *Railroad*.

RECEIVER.

A receiver has authority with the approval of the court that appointed him to compromise a judgment debt of two joint debtors, where he has been unable to find any property of either of them, by releasing the debtors on receiving a sum of money less than the amount of the judgment from one of them. *Brooks v. Neal*, 467.

REFERENDUM.

Construction of the charter of Lowell, St. 1911, c. 645, § 61, as to a referendum vote on an order of the council to extend a street. *Kelly v. City Clerk of Lowell*, 369.

RELEASE.

In an action by an administrator against a corporation for personal injuries, if the defendant introduces in evidence a release of the cause of action executed by the intestate, and the plaintiff admits its execution, merely denying that the words "I have read the above and agree to it" were written by the intestate, and if there is no evidence of illiteracy, mental incompetency, fraud, misrepresentation or coercion, a verdict must be ordered for the defendant. *LaCroix v. Boston Elevated Railway*, 242.

Where in an intervening petition in a suit in equity setting forth a claim, against a fund in the hands of a trustee, for money due the petitioner for services performed, it is alleged that "an attorney . . . without her [peti-

Release (continued).

tioner's] knowledge and against her express instructions signed her name to releases of her claim against said trust for the consideration of \$30, no part of which she has ever accepted or received," there is no occasion for the petitioner to aver an offer to return the \$30. *Rice v. Merrill*, 279.

A judgment on one entire debt against two joint defendants is discharged as to both defendants by a release under seal discharging one of them. *Brooks v. Neal*, 467.

A receiver has authority with the approval of the court that appointed him to compromise a judgment debt of two joint debtors, where he has been unable to find any property of either of them, by releasing the debtors on receiving a sum of money less than the amount of the judgment from one of them. *Ibid.*

RELIGIOUS SOCIETY.

Where a religious corporation, whose trustees voted to dispense with the services of its priest, thereafter for more than a year accepted such services which he continued to perform, it can be found to be liable to pay for the services. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

REPLEVIN.

Where one, in whose name the owner of an automobile had permitted an automobile to be registered, without the owner's knowledge or consent left the automobile in a public garage, and thereafter, learning these facts, the owner wrote to the proprietor of the garage a certain letter, it was held that the owner was not entitled to take the automobile from the garage by virtue of a writ of replevin without paying or tendering to the proprietor of the garage his proper charges. *Doody v. Collins*, 332.

The mere fact, that the proprietor of a garage "at the time of replevin" of an automobile claims and demands payment of a storage charge for a period of time during which he was not entitled to be paid therefor by the owner, does not estop him from contending that at the time of the issuance of the replevin writ the owner had no right to immediate possession because the proprietor of the garage had a lien for proper charges, and that the owner had made no proper tender. *Ibid.*

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RESTRAINT ON ALIENATION.

Certain pledge agreement by managers of a syndicate was held not to be in violation of the rule prohibiting restraints on alienation. *Minot v. Burroughs*, 595.

REVERE.

A decree, entered after the rescript stating the decision reported in Boston, petitioner, 221 Mass. 468, was held to be correct. *Boston, petitioner*, 36.

It also was held that the rescript accurately expressed the judgment of this court. *Ibid.*

REVIEW, WRIT OF.

The granting or denial of a petition for a writ of review is a matter of discretion. *Watson v. Wenz*, 341.

On a petition for a writ of review no relief will be given from results that naturally followed negligence of the petitioner's counsel in the preparation or the trial of the petitioner's case in the Superior Court. *Ibid.*

ROMAN CATHOLIC CHURCH.

The polity or mode of government of the Roman Catholic Church is not a matter of common knowledge. *Mady v. Holy Trinity Roman Catholic Polish Church*, 23.

It was held to have been error for the judge presiding at the trial of an action against a religious corporation, calling itself Roman Catholic and seeking to be accepted by the Roman Catholic Church but not so accepted, to recover compensation for services performed as a priest, where there had been no evidence in regard to the polity or laws governing the Roman Catholic Church, to make certain comments upon such polity in the charge to the jury. *Ibid.*

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

RULES OF COURT.

Rule 35 of the Superior Court. *Lynch v. C. J. Larives Lumber Co.* 335.

Rule 36 of the Superior Court. *Ibid.*

Equity Rule 12. *Lewenstein v. Forman*, 325.

Equity Rule 21. *Ibid.*

SALE.

Time of Delivery.

In an agreement to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, a requirement of delivery within a reasonable time is implied. *Homer v. Baker Yacht Basin, Inc.* 500.

Evidence at the trial of an action on such a contract, which was held to warrant a finding that the contract was performed by the seller within a reasonable time and that he was entitled to recover damages for the defendant's refusal to receive the engine. *Ibid.*

It also was held that, in assessing damages for the breach of such contract, the plaintiff's loss of profit and the freight charges paid by him properly might be included. *Ibid.*

Warranty.

Construction of a contract to furnish twenty-four thousand tons of furnace coke and of a provision therein as to quality upon which it was held that there was no warranty in the contract as to the quality of the coke to be

Sale (continued).

delivered during the first one or two months under the contract. *Federal Coal & Coke Co. v. Coryell*, 430.

Implied warranty or condition in the sale of food, see the subtitle *post*, *Of Food*.

Representation inducing Purchase.

A representation, made by the seller of coal and relied on by the buyer, was held to have been promissory in its nature and to have stated a reasonable expectation of the seller, and accordingly its falsity did not entitle the buyer to avoid the contract on the ground of fraud. *Federal Coal & Coke Co. v. Coryell*, 430.

Statute of Frauds.

The mere setting apart by their seller of a carload of oats of the value of more than \$500, the seller intending to deliver the oats to a certain buyer under an oral contract of sale of which there is no memorandum in writing, there being no acceptance by the buyer, does not satisfy the requirements of the statute of frauds contained in St. 1908, c. 237, § 4. *Peck v. Abbott & Fernald Co.* 423.

Vendee's Right of Inspection.

Where, at the trial of an action of contract for the purchase price of cabbages, there is evidence that a condition of the sale was that the defendant should have a right to inspect the cabbages after their arrival before he should become liable for the purchase price, and the method of shipment adopted gave the defendant no such right to inspect until the defendant had paid a draft drawn upon him for the purchase price, it is improper for the presiding judge in his charge to make justification for a refusal by the defendant to accept the cabbages conditional upon the defendant having seasonably asked the plaintiff for permission to inspect. *Paddleford v. Lane & Co. Inc.* 113.

The foregoing rule of law is the same, whether the right of inspection in the vendee was a condition precedent to the passing of the property to the vendee or was a condition subsequent enabling the defendant to rescind the sale if on inspection the cabbages were found not to be what the contract called for. *Ibid.*

Method of shipment by the vendor which was held not to have given to the vendee a right of inspection to which he was entitled, nor to the carrier a right to permit an inspection. *Ibid.*

Of Goods of a Specific Quality.

On the evidence at the trial of an action of contract, made by correspondence, for the purchase price of cabbages, it was held that the judge made a material error in his charge in describing the contract as one for a sale of "Danish cabbage," because the contract was for a sale of "fine stock" cabbages and came within the rules of law applicable to contracts for the sale of goods of "a specific quality." *Paddleford v. Lane & Co. Inc.* 113.

Of Food.

Under the sales act, St. 1908, c. 237, § 15, as before at common law, if one buying meat at a shop relies on the skill and judgment of the dealer in selecting

the meat and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, the dealer is liable to the buyer for damages resulting from his supplying unwholesome food. *Gearing v. Berkson*, 257.

If a dealer in meat undertakes to make a selection of pork chops to fill an order given to him by a woman on behalf of her husband, and selects unwholesome meat, the eating of which makes the woman sick, such selection is not, without more, negligence as a matter of law which would make the dealer liable in an action of tort brought against him by the woman for personal injuries so received and alleged to have been caused by his negligence. *Ibid.*

If a wife, acting as the agent of her husband, purchases meat at a shop and in so doing with the knowledge of the dealer relies upon the skill and judgment of the dealer for the selection of wholesome meat, and if the dealer gives to her meat unfit for food upon the eating of which she becomes sick, she cannot maintain against the dealer either an action of contract or an action of tort founded upon the violation of the implied condition of the sale that the food should be wholesome, because the sale was to her husband. *Ibid.*

Under such circumstances, neither spouse has a right to recover for the loss of consortium. *Ibid.*

Conditional.

In an action against the proprietor of a store, who sold goods under contracts of conditional sale, for an assault and battery committed on the plaintiff by an alleged agent of the defendant, when he took from the plaintiff goods, that he had sold to her as a canvasser of the defendant, upon the cancellation by the defendant of the contract of conditional sale before the first payment had been made on it, it was held that there was evidence for the jury that the defendant's alleged agent was acting within the scope of his authority when he committed the assault and battery upon the plaintiff. *Drake v. Metropolitan Manuf. Co.* 314.

SALES ACT.

Under the sales act, St. 1908, c. 237, § 15, as before at common law, if one buying meat at a shop relies on the skill and judgment of the dealer in selecting the meat and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, the dealer is liable to the buyer for damages resulting from his supplying unwholesome food. *Gearing v. Berkson*, 257.

SCHOOL.

A contract with a city, to perform the duties of a teacher of manual training in the public schools of the city at a fixed salary, is a contract for the personal services of the teacher requiring his individual judgment and ability and is subject to the implied condition that the teacher shall be alive and able to do the work, and therefore is terminated by the teacher's death. *Donlan v. Boston*, 285.

Therefore, where a teacher of manual training in the public schools of a city, who is employed by the year at a fixed salary payable in monthly instalments, dies during the summer vacation after the expiration of eleven months of the school year when he has performed all the services required of him for that year, nothing is due to his executor or administrator for the twelfth month. *Ibid.*

SET-OFF.

A creditor of an insolvent corporation, who is liable to the corporation upon an unpaid subscription for shares of its capital stock, when sued upon his subscription by the common law assignee for the benefit of creditors of the corporation cannot set off the debt of the corporation to him, but must pay for his shares in full and is entitled on his claim against the corporation only to his ratable share in the distribution of the assets among the creditors. *Everett v. Foster*, 553.

SHIP.

If one, employed upon a ship upon the high seas owned and operated by a Massachusetts corporation, receives injuries resulting in his death, the questions, whether any, and, if any, what action can be maintained under the circumstances, are determined by the common law and the statutes of this Commonwealth. *Souden v. Fore River Ship Building Co.* 509.

Action for death so caused. *Ibid.*

SMALL LOANS ACT.

Although under the small loans act notes given in violation of its provisions are declared by St. 1911, c. 727, § 17, as amended by St. 1912, c. 675, § 5, to be void, and the amount of any unlawful interest paid upon them may be recovered back in an action at law, a remedy in equity also is given expressly by St. 1911, c. 727, §§ 10, 13, as amended by St. 1912, c. 675, §§ 3, 4. *Thomas v. Burnce*, 311.

Bill in such a suit in equity which was held good on demurrer. *Ibid.*

SNOW AND ICE.

In an action under R. L. c. 51, §§ 20-22, as amended by St. 1908, c. 305, and St. 1913, c. 324, for personal injuries resulting from the fall of ice or snow upon the plaintiff from the roof of a building, where both the owner and the lessee of the building are made defendants, proof of a correct notice in writing addressed to and delivered to the owner, is not proof of a notice to the lessee. *Sweet v. Pecker*, 286.

And, if it appears that the building was within the exclusive control of the lessee and the plaintiff discontinues his action as against the owner, he cannot maintain the action against the lessee without proof of a notice to him. *Ibid.*

STADIUM BRIDGE.

Determination of various questions of law raised by petitions for the assessment of damages caused by the construction of the drawless bridge over the Charles River, called "Anderson," or "Stadium Bridge," from River Street in Cambridge to Cambridge Street in the Brighton district of Boston. *Brackett v. Commonwealth*, 119.

STATUTE.

Construction.

Section 1 of St. 1914, c. 600, which provides that "In all work of any branch of the service of the Commonwealth, or of any city or town therein, citizens of the Commonwealth shall be given preference," is in no way confined in its application, by the subsequent sections of the statute referring to the civil service, to those cities and towns where the classified civil service prevails under the civil service law. *Lee v. Lynn*, 109.

Lord Campbell's act, St. 9 & 10 Vict. c. 93, giving a right of action for damages resulting from death caused by negligence, is remedial and not penal. *Hanlon v. Frederick Leyland & Co. Ltd.* 438.

Extraterritorial Effect.

Whether the provisions of the workmen's compensation act relating to the death of employees were intended to benefit widows or other dependents living in a foreign country and having no domicile in this Commonwealth, here was referred to as a question that was not raised and consequently was not considered. *Fierro's Case*, 378.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 757.

STOCKBROKER.

Failure of a stockholder to tender to a customer within a reasonable time certificates of stock which he had purchased for the customer was held to preclude a trustee in bankruptcy of the stockholder, who, upon the customer refusing to accept the certificates, had sold them at a loss, from recovering from the customer the difference between the price the stockholder had paid and the price for which the trustee had sold. *Brown v. Rushton*, 80.

STREET RAILWAY.

It is a matter of common knowledge that street railway cars cannot be run at any considerable rate of speed without creating a current of air. *Selibodea v. Worcester Consolidated Street Railway*, 76.

See also appropriate subtitle under NEGLIGENCE.

SUBROGATION.

An insurance company, which had paid to the plaintiff in an action of tort the amount of the loss sustained by reason of the negligence of the defendant, was held to have been subrogated to the rights of the plaintiff against the defendant and to be entitled to maintain the action in the plaintiff's name. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

SUBWAY.

Action for personal injuries resulting from negligence in use of a public street in the construction of a subway, see appropriate subtitle under NEGLIGENCE.

SUPERIOR COURT.

The Superior Court had no jurisdiction over petitions under St. 1911, c. 439, for the assessment of damages caused by the construction of the drawless bridge called "Anderson," or "Stadium Bridge" over Charles River. *Brckett v. Commonwealth*, 119.

Whether the Superior Court ever can have jurisdiction to try and decide a suit for divorce in which the venue of the libel was laid wrongly because neither of the parties lived in the country where the libel was filed as required by R. L. c. 152, § 6, here was mentioned as a question which it was not necessary to decide in the present case. *Sampson v. Sampson*, 451.

SUPREME JUDICIAL COURT.

Commissioners appointed upon a petition under St. 1911, c. 439, for the assessment of damages caused by the construction of the drawless bridge over the Charles River called "Anderson," or "Stadium Bridge," were held to be officers of the Supreme Judicial Court by whom they were appointed. *Brckett v. Commonwealth*, 119.

That court therefore had the power and was charged with the duty of enforcing the report of such commissioners if it was according to the law and ought to be enforced. *Ibid.*

On an appeal by the defendants from a decree ordering the specific performance of a contract to purchase certain hotel property from the plaintiff, entered by order of a judge of the Superior Court in pursuance of a rescript stating a decision of this court, where the only question presented was whether the decree appealed from conformed to the rescript, it was held that the decree must be construed in the light of the findings of the master confirmed by the decision of this court, and that it was not open to the defendants to discuss any issue thus disposed of. *King v. Connors*, 305.

SYNDICATE.

Construction and effect of an agreement forming a voluntary association, called a syndicate, for the purpose of the acquiring through a contract held by a certain corporation of fifty-two per cent of the capital stock of a certain copper company, and "also for the purpose of purchasing remaining stock of

said [copper company]" and of developing the property. *Bradley v. Borden*, 575.

Under the above described syndicate agreement, it was held that the syndicate managers had authority to employ a certain expert and pay him for information valuable and necessary for a complete understanding of the business of the copper company. *Ibid.*

It also was held that the syndicate managers had no authority to set aside certain shares of stock to be delivered to certain persons as a reward for faithful past services, such recognition of a moral obligation not being within the "purposes" of the agreement. *Ibid.*

Nor did the syndicate managers have authority to grant an option to purchase certain shares of stock to another person in consideration of present service and future service to be rendered, the "present" service having been rendered voluntarily and the grantee of the option being under no binding agreement to render any service in the future. *Ibid.*

Certain acts, as to the issuance of income bonds by the corporation and the placing of its stock in a voting trust, performed by the syndicate managers in good faith, were held to have been a proper exercise of "their sole and absolute discretion," because there was no provision in the syndicate agreement that, when the affairs of the syndicate should be wound up by the syndicate managers at the end of the three years, there should be any distribution of the shares of stock of the copper company *in specie* to the subscribers. *Ibid.*

A suit in equity, filed three days after the expiration of the time of termination provided for in a syndicate agreement, praying for a winding up of the syndicate and the distribution of its property among the subscribers, was held to have been brought prematurely because a master found "that a reasonable time for winding up the affairs of the syndicate, after the time when it terminated by the terms of the agreement, was one month after" the day of termination. *Ibid.*

Under the provisions of an agreement in writing organizing an "underwriting syndicate" for the exploitation and promotion of a dock property in East Boston by which the subscribers appointed two syndicate managers with full powers, the plan set forth in the syndicate agreement being to acquire the dock property at a price deemed to be less than its value and to sell it again at its greater true value to a real estate trust, to be organized by the syndicate, whose shares were to be sold to the public, it was held that the making and performance, without notice to holders of syndicate receipts, of a pledge agreement of unissued shares to trustees holding the property were clearly within the broad powers given and intended to be given to the syndicate managers, and that there was no failure of duty on the part of the trustees. *Minot v. Burroughs*, 595.

It also was said that the word "underwriting" used in this connection meant simply that the persons joining in the scheme agreed to furnish the necessary money and to take the shares which were not bought by the public. *Ibid.*

And that the word "syndicate" used in this connection meant an association of persons with a community of interest in the fund raised for carrying on the particular undertaking. *Ibid.*

It also was held that the trustees had assumed no obligations toward the holders of syndicate receipts. *Ibid.*

It appeared that by an express provision of the syndicate receipts every holder of them became a party to the underwriting agreement and was "bound ac-

Syndicate (*continued*).

cordingly," and it was held that the fact that some of the plaintiffs had purchased their syndicate receipts at high prices was of no consequence, as each purchaser became a joint adventurer in the syndicate speculation with all its possibilities of loss as well as of profit. *Minot v. Burroughs*, 595.

It also was held that the mere fact that the pledge agreement might not be concluded before the expiration of the syndicate did not show that the powers of the managers were exceeded in making it, and that there was nothing to indicate that there could not be a distribution of the assets of the syndicate when it expired, subject to the pledge agreement, if that still should be in force. *Ibid.*

It was held that, although neither the managers nor the trustees were under any legal obligation to keep the capitalization of the trust within the limits of its actual earning capacity, yet the attempted execution of a purpose to accomplish this result was an attempt on the part of the managers to carry out in good faith what was deemed by the trustees to be a moral obligation. *Ibid.*

It also was held that the rule against perpetuities had no application to the pledge agreement. *Ibid.*

Nor, under the circumstances disclosed, was it contrary to the rule against restraints on alienation. *Ibid.*

It therefore was held that two thousand shares of the dock trust held by the trustees as collateral might be cancelled, so as to reduce the capital indebtedness of the syndicate. *Ibid.*

TAX.

Assessment for Benefits.

Where the selectmen and the superintendent of construction of streets of a town merely have given notice to a landowner to remove within thirty days all trees, fences and other property from a certain portion of his land, there is no occasion to grant a petition of the landowner for a writ of prohibition to restrain the assessment of betterments. *Smith v. Selectmen of Norwood*, 222.

Excise on Corporation Franchise.

Returns of domestic business corporations to the tax commissioner cannot be used in evidence in collateral proceedings. *Brckett v. Commonwealth*, 119.

Our tax law makes no discrimination in favor of shareholders of trust companies as against shareholders of national banks. *A. J. Tower Co. v. Commonwealth*, 371.

Under St. 1909, c. 490, Part III, §§ 11, 20, 41, 43, the tax commissioner, in determining the amount of the franchise tax to be levied upon a domestic business corporation owning shares of stock in national banks, should refuse to make deductions of the value of these shares under § 41. *Ibid.*

This rule does not violate U. S. Rev. Sts. § 5219. *Ibid.*

In deciding the points stated above it was assumed, without deciding it, that the payment of the property tax upon the shares of national bank stock owned by the plaintiff, a domestic business corporation, was valid. *Ibid.*

On Legacies and Successions.

A gift by will to the testator's wife of the use of and income from all of his estate, accompanied by a provision that, if the income in her judgment should be insufficient for her support, comfort and enjoyment, "or for any other purpose for which she may wish to spend money," she should have power to sell "any of my estate, real, personal and mixed," and to spend the proceeds for such purposes, was held to be a life estate, so that an inheritance tax due to the Commonwealth should be computed accordingly. *Kemp v. Kemp*, 32.

Jurisdiction for the purpose of imposing a succession tax exists only when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the State levying the tax. *Welch v. Treasurer & Receiver General*, 87.

Under St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, it is for the courts of this Commonwealth to determine whether property of a resident of this Commonwealth which is not therein at the time of his death is "legally subject" to a legacy tax in another State or country. *Ibid.*

By the foregoing provisions, the Legislature intended to surrender the power of this Commonwealth to impose a succession tax upon property of a resident of this Commonwealth which is not therein at the time of his death only when a succession tax has been levied by another State or country which it was within the jurisdictional power of such State or country to levy. *Ibid.*

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State, such shares have a *situs* both in this Commonwealth, which is the owner's domicile, and in such other State, which is the domicile of the corporation, sufficient to give jurisdictional power to both States to impose a succession tax. *Ibid.*

If a resident of this Commonwealth at the time of his death owns shares of capital stock in a railroad corporation incorporated in three other States in which it operates its railroad, each of such three other States has jurisdictional power to impose a succession tax upon the shares. *Ibid.*

Where a resident of this Commonwealth at the time of his death owned shares of stock in a corporation incorporated in another State and owning property in a third State, such shares are not, under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2, "legally subject" to a succession tax in the third State, because that State has no jurisdictional power to levy the tax. *Ibid.*

And, even if such a tax is levied and paid in such State, there should not be any deduction by reason of such payment from the tax here imposed upon the shares by the provisions of the statute. *Ibid.*

In the absence of something to indicate inequality before the law, inevitable and general disproportion, or oppressiveness or discrimination, a succession tax imposed by another State within its jurisdictional powers upon shares of stock in a corporation there incorporated is a tax to which the shares there are "legally subject." *Ibid.*

Its amount therefore cannot be questioned in the computation of the tax to be imposed in this Commonwealth under the provisions of St. 1909, c. 490, Part IV, § 3, as amended by St. 1911, c. 502, § 1, and St. 1912, c. 678, § 2. *Ibid.*

In this case in imposing a succession tax upon shares of the capital stock of a

Tax (*continued*).

railroad corporation incorporated in Michigan, Illinois and Wisconsin, which were owned by a decedent domiciled in Massachusetts at the time of his death, a Probate Court of the State of Michigan computed the tax as though the corporation were incorporated solely in Michigan and it was held that that tax was a succession tax to which the shares were "legally subject" in Michigan and that its amount should be considered in computing the succession tax due in this Commonwealth. *Welch v. Treasurer & Receiver General*, 87.

A resident of another State, who is the mortgagee under a mortgage of real estate in this Commonwealth, has an interest in the real estate that at his death is subject to a succession tax under St. 1912, c. 678, § 1. *Hawkrigde v. Treasurer & Receiver General*, 134.

Upon the construction of the provision of the residuary clause of a will creating a trust, it was held that the testator's daughter took a vested estate in one half of the principal of the trust fund, which was to come to her upon the termination of the trust, subject to be divested by the happening of certain contingencies which did not occur, and that her son upon the termination of the trust took this half of the trust fund as her heir at law and next of kin, so that under St. 1909, c. 490, Part IV, § 1, the Commonwealth was entitled to collect a succession tax upon the passing of the property. *Hall v. Beebe*, 306.

Abatement.

Failure of a corporation, petitioning for the assessment of damages to its real estate under a statute, to claim an abatement of a tax is not an admission that the assessment of real estate was correct. *Brackett v. Commonwealth*, 119.

TIME.

Failure of a stockbroker to tender to a customer within a reasonable time certificates of stock which he had purchased for the customer was held to preclude a trustee in bankruptcy of the stockbroker, who, upon the customer refusing to accept the certificates, had sold them at a loss, from recovering from the customer the difference between the price the stockbroker had paid and the price for which the trustee had sold. *Brown v. Rushton*, 80.

In an agreement to purchase a Sterling engine to be shipped from Buffalo, where in the order for the engine no time for delivery is named, a requirement of delivery within a reasonable time is implied. *Homer v. Baker Yacht Basin, Inc.* 500.

Evidence at the trial of an action on such a contract, which was held to warrant a finding that the contract was performed by the seller within a reasonable time and that he was entitled to recover damages for the defendant's refusal to receive the engine. *Ibid.*

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADE NAME.

The mere use by a retail dealer in a certain business territory of a trade name, which another dealer has found highly effective in bringing his goods to the

favorable attention of the public in another business territory, constitutes no actionable wrong. *Kaufman v. Kaufman*, 104.

From certain facts as to the use of a widely advertised trade name and symbols by a retail dealer in hats in forty-one stores in nine different States, including Greater New York, Providence and Boston, it was held that it could not be inferred that a market for hats, sufficient to give him the exclusive right to the use therein of his trade name and symbols, reached to Worcester or to Woonsocket in Rhode Island or to New Haven in Connecticut. *Ibid.*

And a suit in equity to enjoin such use cannot be maintained. *Ibid.*

TRESPASS.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way. *Patrick v. Desiel*, 505.

In an action of contract against a corporation to recover compensation for the damage done by extra poles erected by the defendant on the land of the plaintiff in the exercise of an easement, it was held that under the easement and a contract contained in a deed the poles were unauthorized structures, whose erection was a trespass, and accordingly that the plaintiff could not recover compensation for "extra poles" in an action of contract, although he might be permitted to amend his action into an action of tort. *Foster v. Connecticut River Transmission Co.* 528.

Where for a period of more than twenty years the roof of a building openly and conspicuously had extended four feet over the adjoining land, causing water to drip and snow and ice to fall thereon, under the circumstances it was held that a bill in equity by the owner of the servient estate to restrain the owner of the dominant estate from permitting the roof to project over the plaintiff's premises must be dismissed. *Matthys v. First Swedish Baptist Church of Boston*, 544.

Where the agent of a manufacturer of automobiles had established a rule prohibiting chauffeurs in his employ from carrying any employee in any customer's car, which rule occasionally was violated but without the employer's knowledge, an employee who at the invitation of a chauffeur was riding in such a car when a collision occurred and he was injured was held to be in the position of a trespasser to whom the employer owed no duty of care. *Walker v. Fuller*, 566.

TRUST.

Construction.

Under a certain spendthrift trust instrument it was held that the trustee was required to exercise prudence and reasonableness in making payments to the beneficiary and should make such payments as a protection against her necessities, and should not act upon caprice or careless good nature, much less from a desire to be relieved from trouble and the possibility of making a foolish investment. *Corkery v. Dorsey*, 97.

Upon construction of a trust created by an interlocutory decree in equity ordering that certain specified property should be transferred to a trustee, "in trust, to pay all present just debts, charges and expenses, of said E. R.," it was held that a petition to intervene in the suit filed seven years and a half after the decree was made by an alleged creditor of E. R., was not barred by

Trust (*continued*).

the statute of limitations because the statute did not begin to run in favor of the trustee unless and until the trust was repudiated by him. *Rice v. Merrill*, 279.

Upon the construction of the provision of the residuary clause of a will creating a trust, it was held that the testator's daughter took a vested estate in one half of the principal of the trust fund, which was to come to her upon the termination of the trust, subject to be divested by the happening of certain contingencies which did not occur, and that her son upon the termination of the trust took this half of the trust fund as her heir at law and next of kin. *Hall v. Beebe*, 306.

Construction of a trust in a will, where property was given to a town, the income to be used for the preservation of a monument at the testator's grave and for the care and beautifying of his lot in the cemetery, with a direction that the town should not expend more than four per cent a year for such purposes, where it was held that the trustee in the performance of the trust was not controlled by the standard adopted in the care of the lots in the same cemetery. *McCoy v. Natick*, 322.

It was intimated that, if the average net income from the trust described above in a series of years should exceed four per cent upon the principal, a question fairly might be raised as to the disposition of the surplus. *Ibid*.

And also that a like question fairly might be raised if it should prove impossible reasonably to expend the income in the manner provided by the trust without waste. *Ibid*.

Validity of a power reserved to himself by a settlor of a trust created by deed for the maintenance and support of his wife and children, "in and by his last will and testament to debar and prohibit either of his said children from any share or part of said trust property, the income, profits and accumulations thereof anything herein to the contrary notwithstanding." *Watson v. Watson*, 425.

Proper exercise of such power. *Ibid*.

Result of a revocation under such power was held to be that the trust could not be terminated until the death of the last survivor of the settlor's children and that in the meantime no child could receive any part of the principal. *Ibid*.

The word "either," as used in the phrase in the above trust, "either of his said children," and also as used by the settlor in his testamentary exercise of a power in the deed, was held to have been used in the sense of "any," and to have excluded all his children from the principal of the trust. *Ibid*.

In further construction of the same trust deed, it was held that the settlor had the power, which he had exercised properly by his will, to direct that \$5,000 should be paid from the income of the trust to each of his sons, and that the right of the other children to share in the income was postponed until the two payments of \$5,000 each had been made from the net income accumulated for the purpose. *Ibid*.

And it also was held that a discretionary power given by the deed of trust to the trustees, to apply any part of the principal for the benefit of the children when in their judgment it became necessary, was revoked. *Ibid*.

Administration.

Construction of a trust in a will, where property was given to a town, the income to be used for the preservation of a monument at the testator's grave

and for the care and beautifying of his lot in the cemetery, with a direction that the town should not expend more than four per cent a year for such purposes, where it was held that the trustee in the performance of the trust was not controlled by the standard adopted in the care of the lots in the same cemetery. *McCoy v. Natick*, 322.

Capital and Income.

Where a dividend is declared on shares in a corporation held by a trustee under a trust and where the vote of the directors of the corporation recited that such dividend was "declared out of accumulated surplus profits of this company," which recital is true, the whole of the dividend must be treated by the trustee as income and distributed although the larger part of the dividend is payable in shares of another corporation and the whole dividend amounts in value to \$33.30 on each share of \$100. *Gray v. Hemenway*, 293.

A dividend made by a corporation from its accumulated surplus profits is none the less to be treated as income because a part of the surplus came from a special dividend that it received upon the shares of another corporation held by it and was derived by such other corporation from its profits in the sale of certain property held by it. *Ibid.*

Nor is such a dividend any the less to be treated as income because derived in part from profits gained in the conversion into shares of certain convertible bonds previously issued by the corporation. *Ibid.*

Trustee's Duty to Invest Funds.

Whether a trustee, to whom a lessee has paid money to be held as security for the payment of the rent under the lease, would be liable for a failure to invest the money, was not decided. *Thompson v. Knapp*, 277.

Trustee's Accounting for Income.

Where the lessee under a ten year lease deposited with a third person as trustee the sum of \$3,000 as security for the payment of the rent under the lease, it was held, in a suit in equity by the lessee against the trustee for an accounting, that the defendant, who had held the fund deposited with him upon an express trust and had invested it, was bound to account to the plaintiff for the interest earned. *Thompson v. Knapp*, 277.

And it was said that, inasmuch as the defendant had invested the fund, it was not necessary to consider whether he would have been liable for a failure to invest it. *Ibid.*

And it was assumed from the record that a claim of the trustee for compensation either was disallowed or had been waived. *Ibid.*

Trustee's Compensation.

Whether a trustee, to whom a lessee has paid money to be held as security for the payment of the rent under the lease, would be entitled to compensation, was not decided it being assumed that a claim for such compensation either had been disallowed or had been waived. *Thompson v. Knapp*, 277.

Personal Liability of Trustees.

If two persons, who are the trustees of a real estate trust, make a contract in writing for work and material to be furnished to them and sign the contract with the word "trustees" after their names, they are none the less on this account liable on the contract personally. *Philip Carey Co. v. Pingree*, 352.

Resulting.

In order that a husband may establish a resulting trust in real estate purchased in the name of his wife, he must prove that he furnished either the entire consideration or a specific and definite part of it for which he should receive a determinate fraction of the property conveyed, and he further must show that it was not intended at the time of the conveyance that the wife should take a beneficial interest in the property by way of gift. *Pollock v. Pollock*, 382.

Application of the foregoing rule, showing that no resulting trust existed under certain circumstances. *Ibid.*

Where the husband caused the title of real estate to be taken in the name of his wife because "he wished to prevent these premises from being taken for his obligation" to existing creditors, this affords him no ground for establishing a resulting trust in the property conveyed. *Ibid.*

Spendthrift.

One, to whom any unexpended balance of a spendthrift trust fund might be paid at the death of a life beneficiary in case she had not disposed of it by her will according to a power given to her by the trust instrument, has a right, in no way depending upon the discretion of the court, to maintain a suit in equity to set aside an improper payment of the fund by the trustee to the life beneficiary irrespective of what motives actuate him in the institution of the suit. *Corkery v. Dorsey*, 97.

Under a certain spendthrift trust instrument it was held that the trustee was required to exercise prudence and reasonableness in making payments to the beneficiary and should make such payments as a protection against her necessities, and should not act upon caprice or careless good nature, much less from a desire to be relieved from trouble and the possibility of making a foolish investment. *Ibid.*

Action of the trustee under the above instrument, within three years after the trust was established, in paying over to the beneficiary the entire balance of the fund remaining in his hands was held under the circumstances to be unjustifiable, and, on a bill in equity by one interested as a beneficiary on the death of the life beneficiary without disposing of the fund by her will, it was held that the life beneficiary would be compelled to repay to the trustee so much of the fund as was not needed for her immediate necessities. *Ibid.*

In this case, because of improper motives which actuated the plaintiff, he was not awarded costs. *Ibid.*

TRUST COMPANY.

Our tax law makes no discrimination in favor of shareholders of trust companies as against shareholders of national banks. *A. J. Tower Co. v. Commonwealth*, 371.

UNFAIR COMPETITION.

The mere use by a retail dealer in a certain business territory of a trade name, which another dealer has found highly effective in bringing his goods to the favorable attention of the public in another business territory, constitutes no actionable wrong. *Kaufman v. Kaufman*, 104.

And a suit in equity to enjoin such use cannot be maintained. *Ibid*.

VACATION.

Vacation of decrees and judgments, see appropriate subtitle under JUDGMENT.

VENUE.

A petition to assess damages for land taken by the street commissioners of the city of Boston under St. 1909, c. 486, § 31, by a taking originally invalid, which afterwards was made valid by the confirmatory statute St. 1914, c. 569, can be filed only in the county of Suffolk, and such a petition filed in the county of Middlesex must be dismissed. *N. Ward Co. v. Boston*, 367.

In the provision of R. L. c. 152, § 6, that "Libels for divorce shall be filed, heard and determined in the Superior Court held for the county in which one of the parties lives," the word "lives" plainly means "has his or her legal residence or domicil." *Sampson v. Sampson*, 451.

VOLUNTARY ASSOCIATION.

Construction and effect of an agreement forming a voluntary association, called a syndicate, for the purpose of the acquiring through a contract held by a certain corporation of fifty-two per cent of the capital stock of a certain copper company, and "also for the purpose of purchasing remaining stock of said [copper company]" and for developing the property. *Bradley v. Borden*, 575.

Construction, validity and effect of an agreement in writing organizing an underwriting syndicate for the exploitation and promotion of a dock property in East Boston, whereby the subscribers appointed two syndicate managers with full powers, the plan set forth in the syndicate agreement being to acquire the dock property at a price deemed to be less than its true value and to sell it again at its greater true value to a real estate trust, to be organized by the syndicate, whose shares were to be sold to the public. *Minot v. Burroughs*, 595.

WAIVER.

Whether the requirement of the workmen's compensation act, that a claim under the act must be filed within six months after the occurrence of the injury to the employee, is one that can be waived by the insurer, here was spoken of as a question which it was not necessary to decide in the present case. *Fierro's Case*, 378.

Requirement of the signature of the employee to a bond of a surety company insuring his fidelity was held not to have been waived by the insurer by a certain letter to the insured, not signed by any of the officers authorized to

Waiver (*continued*).

make such a waiver for the corporation and not shown to have come to their knowledge, although the insured relies on the letter and makes no attempt to obtain the signature of the employee. *Wilcock v. Massachusetts Bonding & Ins. Co.* 482.

A contract in writing can be changed or modified by a subsequent oral agreement of the parties, and the performance of any requirement of the contract may be waived orally or by the conduct of the parties. *Gousoulas v. F. W. Stock & Sons*, 537.

WAY.

Private.

Evidence, at the trial of actions by a milkman, against a railroad corporation whose engineer in the changing of the grade of a private street during the abolition of a grade crossing unnecessarily and negligently drove a stake into the beaten path of a sidewalk upon which the plaintiff stumbled, and against a contractor employed by the railroad corporation, was held to warrant findings that the plaintiff was in the exercise of due care and that each of the defendants was negligent. *Coles v. Boston & Maine Railroad*, 408.

Public.

Proper use of.

A boy twelve years of age rolling a hoop upon a highway is not, merely by reason of that fact, a trespasser upon the way. *Patrick v. Deziel*, 505.

In St. 1911, c. 741, relating to the construction by the Boston Transit Commission of certain subways and tunnels, the provision in § 18 as to leaving streets "open for traffic" during certain hours when the work is being done is intended to include in the word "traffic" travel upon such streets for any proper purpose by pedestrians and vehicles, and includes a crossing of such a street by an employee in a store facing on it for the purpose of posting a letter in a mail box. *Stewart v. Hugh Nawn Contracting Co.* 525.

Liability of the city and of a contractor in actions for injuries received by such an employee at a place where planking had been substituted for the pavement. *Ibid.*

A corporation engaged as a contractor in building a section of the Dorchester tunnel under a contract with the Boston Transit Commission as authorized by St. 1911, c. 741, § 17, has a right to use the part of the public streets necessary for the performance of its contract. *Murphy v. Hugh Nawn Contracting Co.* 404.

Consequently such a contractor has a right in the course of its work to place a timber on the sidewalk of a street, but in doing so it must take precautions by barriers, signs or other adequate means to protect the travelling public from harm. *Ibid.*

But in doing so it is not relieved from the duty of using proper care in performing its contract and is liable for an injury caused by its negligence to a traveller on the highway in the exercise of due care. *Ibid.*

Betterment tax.

Assessment for benefits resulting from construction of streets of a town, see appropriate subtitle under TAX.

Discontinuance.

Where a public highway once has been established it remains a public highway until it is discontinued as such by a duly authorized public board or officer or until the place of its location is given over lawfully to some other purpose. *Eklon v. Chelsea*, 213.

The facts that the park commissioners of a city, acting under proper authority, "set out with shrubbery and laid out in grass" an area adjoining a highway and constructed round it a brick walk with a curbing, a part of which was within the limits of the highway, do not deprive of its character the part of the highway occupied by the brick walk and its curbing, and the city is liable to a traveller who sustains an injury from a defect in the curbing of this part of the brick walk of which the city had notice. *Ibid.*

Defect.

On the evidence at the trial of an action against a town for personal injuries caused by stumbling over a grade stake in a street undergoing repairs, it was held that findings were warranted that the plaintiff was in the exercise of due care, that the street was not closed to public travel and that the defendant had failed in its duty to maintain the street in a reasonably safe condition for travellers. *McCarthy v. Stoneham*, 173.

The facts that the park commissioners of a city, acting under proper authority, "set out with shrubbery and laid out in grass" an area adjoining a highway and constructed round it a brick walk with a curbing, a part of which was within the limits of the highway, do not deprive of its character the part of the highway occupied by the brick walk and its curbing, and the city is liable to a traveller who sustains an injury from a defect in the curbing of this part of the brick walk of which the city had notice. *Eklon v. Chelsea*, 213.

Under the circumstances in the above case it also was held that no question arose as to notice to the defendant as to the defect, because the stake was placed in the highway under the direction of the defendant's officials. *Ibid.*

Where one, who was injured by a defect in a public way called M Avenue in a town, in his notice stated that "The place on said M Avenue where my said accident happened was at its junction with C Street," and it appeared that C Street entered but did not cross M Avenue, and that the plaintiff was injured by stumbling on a grade stake in the gutter on the side of M Avenue farther from C Street, it was held to have been proper for the judge to submit to the jury the question whether the notice was inaccurate, and, if it was, whether there was any intention on the part of the plaintiff to mislead the defendant and whether the defendant was misled. *Ibid.*

It also was held that, in view of the proximity of the stake to the junction of M Avenue and C Street and of the evidence that it was placed there by authority of the defendant, under the circumstances shown a finding of the jury was warranted that the defendant was not misled by any inaccuracy in the notice. *Ibid.*

On the evidence at the trial of an action of tort against the city of Boston under R. L. c. 51, § 18, for personal injuries received by the plaintiff when she was crossing Boylston Street at a place where a contractor, working under the Boston Transit Commission in the construction of the subway by authority of St. 1911, c. 741, had substituted planks for the pavement, it was held that the question, whether the defendant knew or in the exercise

Way (*continued*).

of reasonable care should have known of the defective condition of the street, was for the jury. *Stewart v. Hugh Nawn Contracting Co.* 525.

It also was held that the city was not released from liability merely because the work was being done by a contractor employed by the Boston Transit Commission. *Ibid.*

Contractor against whom the plaintiff also brought an action, which was tried with that described above, also was held to be liable on the same evidence. *Ibid.*

Where, at such trial, the plaintiff has described a defective condition which she observed at the time of the accident and has testified that she observed the plank three weeks after the accident and that the condition was the same then as it was at the time of the accident, another witness, who saw the plank for the first time three weeks after the accident, may describe its condition at that time. *Ibid.*

Indemnity for loss and expense resulting from void layout.

Under the provision of the highway act, contained in the last clause of R. L. c. 48, § 13, one, who opposed before the county commissioners the granting of a petition to lay out a highway across his land, and, after the petition was granted by the county commissioners, filed and successfully maintained a petition for a writ of certiorari to quash the order for the laying out, is not entitled to be indemnified for counsel fees and other expenses and for loss of time incurred in relation to these matters. *Main v. County of Plymouth*, 66.

WILL.

Evidence as to the execution and attestation of an instrument purporting to be the last will of one who had been "an old fashioned country lawyer — a squire" where two of the three persons named as witnesses had died before the instrument was presented for probate and the surviving witness testified that he did not remember seeing the alleged testator sign the will was held to warrant an inference that the will was executed by the testator in the presence of the three witnesses before it was subscribed by them and that its execution and attestation were complete and valid under R. L. c. 135, § 1. *Pratt v. Dalby*, 559.

WITNESS.

Cross-examination.

A witness in an action of tort for loss of an automobile, who had testified for the plaintiff as to its value, should be allowed to be asked questions on cross-examination tending to show that he was working for an insurance company for whose benefit the action was brought or for agents representing that insurance company. *Stevens v. Stewart-Warner Speedometer Corp.* 44.

In an action against a corporation for personal injuries, the plaintiff in his cross-examination of a witness for the defendant may make use of the substance on an answer to one of the interrogatories propounded by the plaintiff to the defendant's president. *Freeman v. United Fruit Co.* 300.

Redirect Examination.

At the trial of an action against a street railway company for personal injuries suffered by the plaintiff in a collision where another person was killed, it was

held that it could not be said that the judge improperly exercised his discretion in excluding a question asked by the defendant of its motorman on re-direct examination for the purpose of showing that the witness in testifying at an inquest was under a severe mental strain and that contradictions in his testimony were to be attributed to that fact. *Godfrey v. Old Colony Street Railway*, 419.

Impeachment.

A record of a conviction following a plea of *nolo contendere* cannot be used in another proceeding to affect the credibility as a witness of the person so convicted. *Olszewski v. Goldberg*, 27.

Refreshing Recollection.

A witness cannot be allowed to refresh his recollection by a paper containing statements in regard to matters of which he never had any personal knowledge, because he can have no recollection to refresh. *Kaplan v. Gross*, 152.

Absent Witness.

Where, at a fourth trial of an action a witness who formerly had been an employee of the defendant was not called to testify and there was no evidence that he was in the control either of the plaintiff or of the defendant, it was held that the judge erred in leaving to the jury the question, whether any inference should be drawn against the defendant from the absence of the witness, and that he should have ruled that no inference could be drawn against either the plaintiff or the defendant from the failure to produce the witness. *Fitzpatrick v. Boston Elevated Railway*, 475.

WORDS.

- "Account." See *Kaplan v. Gross*, 152, 154.
- "Creditors." See *Pollock v. Pollock*, 382, 385.
- "Culpable neglect." See *Estabrook v. Moulton*, 359, 360.
- "Either." See *Watson v. Watson*, 425, 428, 429.
- "Extended." See *Hobart v. Weston*, 161, 167.
- "Fast." See *Selibedea v. Worcester Consolidated Street Railway*, 76, 79.
- "Good Faith." See *Minot v. Burroughs*, 595, 603, 604.
- "Laborers." See *Devney's Case*, 270, 271, 272.
- "Legally subject." See *Welch v. Treasurer & Receiver General*, 87, 91, 97.
- "Lived." See *Sampson v. Sampson*, 451, 461.
- "Lives." See *Sampson v. Sampson*, 451, 461.
- "Lost." See *Gove's Case*, 187, 195.
- "Mechanics." See *Devney's Case*, 270, 272.
- "Obligation." See *Pollock v. Pollock*, 382, 385.
- "Party who is aggrieved." See *Donovan v. Donovan*, 6, 7.
- "Porte-cochère." See *Hartt v. Rueter*, 207, 212.
- "Public works." See *Lee v. Lynn*, 109, 113.
- "Remaining stock." See *Bradley v. Borden*, 575, 587.
- "Right of way." See *Driscoll v. Boston Elevated Railway*, 533, 536.
- "Syndicate." See *Minot v. Burroughs*, 595, 602.

Words (*continued*).

"Traffic." See *Stewart v. Hugh Nawn Contracting Co.* 525, 527, 528.

"Underwriting." See *Minot v. Burroughs*, 595, 602.

"Workmen." See *Demey's Case*, 270, 272.

WORKMEN'S COMPENSATION ACT.

Practice.

Notice.

Under the provision of St. 1911, c. 751, Part II, § 18, that a claim for compensation under the workmen's compensation act shall not be barred for want of notice "if it be shown that the association, subscriber or agent had knowledge of the injury," proof that the injured workman within three days from the time he received the injury gave oral notice of it to his foreman and that "a report of the injury to the employee was filed promptly by the subscriber," establishes knowledge of the subscriber which makes proof of notice unnecessary. *McLean's Case*, 342.

Filing of claim.

It was held that, under the circumstances, ignorance by an injured workman of the requirement of St. 1911, c. 751, Part II, § 23, as added by St. 1912, c. 571, § 5, that a claim in writing for compensation shall be filed with the Industrial Accident Board within the six months prescribed by § 15, could not be found to be a "mistake or other reasonable cause" for the omission to file such a claim. *McLean's Case*, 342.

There is nothing in St. 1911, c. 751, Part II, §§ 15, 23, as amended by St. 1912, c. 571, § 5, which requires that a claim for compensation under the workmen's compensation act shall state anything more than "the time, place, cause and nature of the injury;" and the particular results of the injury, which often cannot be anticipated, are not required to be stated. *Lemieux's Case*, 346.

Under St. 1912, c. 571, § 5, the fact, that the widow of a deceased employee, who makes a claim as his dependent, resides in Italy, does not in itself warrant a finding that there was reasonable cause for her failure to file her claim within six months after the injury to her husband that resulted in his death. *Fierro's Case*, 378.

Whether the requirement of the workmen's compensation act, that a claim under the act must be filed within six months after the occurrence of the injury to the employee, is one that can be waived by the insurer, here was spoken of as a question which it was not necessary to decide in the present case. *Ibid.*

Deposition.

A deposition of a claimant for compensation as a dependent under the workmen's compensation act is competent evidence upon the question of the dependency of the claimant, and the weight to be given to it is to be determined by the arbitration committee and the Industrial Accident Board. *Fierro's Case*, 378.

Persons to whom Act applies.

A hoseman stationed at an engine house in the city of Boston, who is a member of the fire department of that city, is not a laborer, a workman or a mechanic within the meaning of St. 1913, c. 807, § 1, which provides that a city ac-

cepting that statute shall pay compensation in the manner provided in the workmen's compensation act to "laborers, workmen and mechanics employed by it." *Deansy's Case*, 270.

Injuries to which Act applies.

Where a compositor in the employ of a newspaper corporation on a hot summer night, following a practice that prevailed among his fellow compositors, descended a fire escape stairway to the roof of an adjoining building belonging to his employer and fell off the roof and was killed, a finding that his death resulted from an injury that arose out of and in the course of his employment within the meaning of St. 1911, c. 751, Part II, §§ 1, 6, was held to have been warranted. *Von Ette's Case*, 56.

In the case stated above it also was held that a finding was warranted that the employee did not commit suicide, that he was not under the influence of liquor and that his death was accidental. *Ibid.*

In the case stated above it appeared that there was an established custom among the employees, which was known to the employer, to go upon the roof for the purpose of obtaining fresh air, although it was contrary to a posted rule of the employer and that going upon the roof was an incident of the employment of the deceased employee and it was held that the board were warranted in finding that the rule was not in force at the time of the accident, and also that the act of the deceased in going on the roof on a hot night was incidental to his employment. *Ibid.*

Where before daylight in darkness and fog a night watchman employed by a construction company was standing near the building of his employer with a bridge operator, when they saw a deputy sheriff and his assistant and each pair of men mistook the other pair for yeggmen who just before had robbed a post office near by, and thereupon shots were exchanged, by one of which the watchman sustained an injury resulting in his death, it was held that, assuming that such injury was received by the watchman "in the course of his employment," it could not be found that the injury was one "arising out of" his employment within the meaning of St. 1911, c. 751, Part II, § 1. *Harbroe's Case*, 139.

Where in a claim under the workmen's compensation act the evidence warranted findings that the employee had "a pre-existing constitutional disease, known as syphilis," which being dormant left unimpaired his ability to perform certain arduous work for which he was employed, and that by reason of an accident arising out of and in the course of his employment his nervous system suffered a shock sufficiently severe to aggravate and accelerate the consequences of this condition until general paralysis and insanity resulted, it was held that an award rightly was made to him of compensation for total incapacity. *Crowley's Case*, 288.

Amount of Compensation.

Under the workmen's compensation act where death has resulted from an injury to an employee arising out of and in the course of his employment, the measure of compensation to which the dependent of the deceased is entitled is not the amount of the loss caused to the dependent by the death of the

employee, but the sum to be paid is measured and determined by the wages of the deceased. *Gove's Case*, 187.

And in case of a partial dependency the sum to be paid to be the same proportion of the average weekly wages as the amount contributed by the employee to such partial dependent bears to the annual earnings of the employee at the time of his injury, without regard to the benefits, if any, received by the employee from the dependent. *Ibid.*

Therefore, where the deceased employee was twenty-three years of age and lived with his father and mother to whom he paid nothing for his board, which was worth \$5 a week, and contributed an average of \$15.38 weekly to the support of his mother, it was held, that the Industrial Accident Board were right in deciding that the mother of the deceased was dependent upon him for support to the extent of \$15.38 and that the value of the board furnished to the deceased should not be deducted from the amount contributed by him to his mother's support. *Ibid.*

On the evidence, it further was held that the compensation of \$15.38 awarded in the above case was correct. *Ibid.*

In the same case it appeared that the deceased was studying at a university and it was held that it was not necessary to decide whether the time devoted by him to his studies was "lost" within the meaning of that word as used in St. 1911, c. 751, Part V, § 2, in defining "Average weekly wages." *Ibid.*

If a workman employed by a subscriber under the workmen's compensation act, who had lost one eye before he entered such employ, is totally incapacitated for work by the loss of his remaining eye from an injury arising out of and in the course of his employment, he is entitled to compensation under the act, although his total incapacity is in part the result of the previous accident by which he lost the first eye. *Branconnier's Case*, 273.

Dependency.

If the widow of a deceased employee is a native and resident of a foreign country and never has been in this country, where her husband remained continuously for six or eight years before his death, and if there is no evidence that she was living apart from her husband for justifiable cause or that he deserted her, she cannot be awarded compensation under clause (a) of St. 1914, c. 708, § 3, as a person conclusively presumed to have been wholly dependent for support upon the deceased employee. *Fierro's Case*, 378.

The question whether such widow was actually dependent in whole or in part upon her husband at the time of his death must be determined under St. 1911, c. 751, Part V, § 2, and the last paragraph of clause (c) of St. 1914, c. 708, § 3. *Ibid.*

Evidence which was held not to warrant a finding that such widow was wholly dependent upon the earnings of her husband for support at the time of the injury that caused his death. *Ibid.*

Whether the provisions of the workmen's compensation act relating to the death of employees were intended to benefit widows or other dependents living in a foreign country and having no domicile in this Commonwealth, here was referred to as a question that was not raised and consequently was not considered. *Ibid.*

In support of the claim of an alleged dependent widow under the workmen's compensation act living in a foreign country, post office records are ad-

missible in evidence to show that the deceased employee purchased money orders payable to his wife. *Fierro's Case*, 378.

A deposition of a claimant for compensation as a dependent under the workmen's compensation act is competent evidence upon the question of the dependency of the claimant, and the weight to be given to it is to be determined by the arbitration committee and the Industrial Accident Board. *Ibid*.

Agreement as to Compensation.

An agreement under the workmen's compensation act between the insurer and an injured employee for specific additional compensation for twenty-five weeks for the loss of three fingers, and its approval by the Industrial Accident Board, are not a final determination that the injury to the employee consisted of the loss of three fingers and was not an injury to the hand rendering it incapable of use. *Lemieux's Case*, 346.

The injured employee, after the compensation under the agreement has been paid in full, still has the right to claim other additional compensation for a further period of twenty-five weeks under St. 1913, c. 445, § 1, as amended by St. 1914, c. 708, § 6 (e), for a hand "not lost but so injured as to be permanently incapable of use." *Ibid*.

Medical and Surgical Attendance.

Under the circumstances it was held that the Industrial Accident Board, under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 5, as amended by St. 1914, c. 708, § 1, had no right to approve the bill of an outside physician. *Pecott's Case*, 546.

Employee's Ignorance of Act's Provisions.

Employee's ignorance of his rights and obligations under the workmen's compensation act does not excuse him from compliance with its requirements. *Pecott's Case*, 546.

Effect upon Employer's Liability.

The provision of St. 1911, c. 751, Part I, § 1, that in an action to recover damages for personal injuries sustained by an employee in the course of his employment it shall not be a defence, that the employee was negligent, that the injury was caused by the negligence of a fellow employee or that the employee had assumed the risk of the injury, has no bearing on what constitutes negligence on the part of an employer. *Walsh v. Turner Centre Dairying Association*, 386.

WRIT OF PROHIBITION.

See PROHIBITION, WRIT OF.

WRIT OF REVIEW.

See REVIEW, WRIT OF.

WRONGDOER WITHOUT REMEDY.

The decision of this court at a previous stage of this case reported in 222 Mass. 156, to the effect that certain acts of a creditor were a fraud upon the law, so that the trustee in bankruptcy in a suit in equity against such creditor could recover the value of certain accounts assigned to the creditor without returning the money received for such accounts by the bankrupt, was affirmed. *Rubenstein v. Lottow*, 227.

The fact that a conveyance was fraudulent as to creditors is no ground for avoiding it between the parties. *Pollock v. Pollock*, 382.

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